



No. 82-1771

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**In the Supreme Court of the United States**

OCTOBER TERM, 1983

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UNITED STATES OF AMERICA, PETITIONER

v.

ALBERTO ANTONIO LEON, ET AL., RESPONDENTS

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*ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT*

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**BRIEF FOR RESPONDENTS  
SANCHEZ, STEWART AND DEL CASTILLO**

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JAY L. LICHTMAN

*Fourteenth Floor  
6420 Wilshire Boulevard  
Los Angeles, California 90048  
(213) 653-9071,*

ROGER L. COSSACK

*Suite 800  
10850 Wilshire Boulevard  
Los Angeles, California 90024  
(213) 470-3888*

*Counsel for Respondents  
Sanchez, Stewart and Del  
Castillo*

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## **BRIEF FOR RESPONDENTS SANCHEZ, STEWART AND DEL CASTILLO**

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Respondents Armando Lazaro Sanchez, Patsy Ann Stewart and Ricardo Albert Del Castillo submit this brief on the merits.

### **STATEMENT**

Respondents adopt the Statement set forth by petitioner with the following modifications and additions:

1. The district court rejected arguments by respondents that standing should be determined by California and federal law, and that under California's vicarious standing doctrine respondents could move for exclusion of all illegally-seized evidence (J.A. 124, 127). In applying strictly federal law, the court made the following rulings pertaining to the respondents' standing: respondent Sanchez could exclude evidence seized from only one of the three residences searched and from no automobiles; respondent Stewart could challenge evidence seized from the same one of three residences and her own automobile; and respondent Del Castillo had standing to contest no residence searches and sim-

ply the search of his own automobile (J.A. 127-29).

2. The prosecution raised the good-faith issue the day following the district court's ruling on the suppression motions (J.A. 139-40). The issue was not litigated below. In fact, the court initially denied respondents' motion to reveal the identity of the informant and then refused attempts to question Officer Rombach concerning his interactions with the informant (J.A. 97-98). In retrospect, these and similar inquiries seem critical to an assessment of whether the officer acted in reasonable good faith in applying for the warrant (see pages 46-48 *infra*).

### SUMMARY OF ARGUMENT

1. For nearly seventy years, the government has been barred from proving a defendant's guilt at a federal criminal trial with evidence seized by federal law enforcement officers in violation of the Fourth Amendment. Through its good-faith proposal, the government now urges this Court to permit use of such evidence if the unconstitutional seizure was due to a reasonable mistake of the police officer. Petitioner contends that since the exclusionary rule is judicially-created, not constitutionally-compelled, this Court can so modify application of the rule if warranted by a cost-benefit analysis.

We submit that where the government seeks to prove guilt at trial with illegally-seized evidence, the exclusionary rule is constitutionally-compelled. First, the rule is an "essential part" of the Fourth Amendment (*Mapp v. Ohio*, 367 U.S. 643, 656 (1961)) and is mandated to give meaning and protection to the Amendment's ban against unreasonable searches and seizures; for, without the rule, the Fourth Amendment "... is of no value, and ... might as well be stricken from the Constitution." *Weeks v. United States*, 232 U.S. 383, 393 (1914). Furthermore, the exclusionary rule has also been given constitutional basis in the Fifth Amendment privilege against self-incrimination, when considered in conjunction with the Fourth Amendment. Commencing with its decision in *Boyd v. United States*, 116

U.S. 616 (1886), this Court has held that when evidence is seized in violation of the Fourth Amendment, exclusion of the evidence at trial is mandated to protect the accused's privilege against self-incrimination.

In addition, the exclusionary rule is not only rooted in the Fourth and Fifth Amendments, it is also a constitutionally-compelled remedy for Fourth Amendment violations. The rule is "a clear, specific and constitutionally required — even if judicially implied — deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to a 'form of words.'" *Mapp*, 367 U.S. at 648. Indeed the exclusionary rule is essential to enforcement of the Fourth Amendment and is the only remedy able to effectively deter police from violating it.

Finally, decisions of this Court have directly held that the good faith of the police officer cannot excuse the Fourth Amendment requirement of probable cause. Otherwise, "... the protections of the fourth amendment would evaporate, and the people would be secure . . . only in the discretion of the police." *Beck v. Ohio*, 379 U.S. 89, 97 (1964). Moreover, the reasoning and holdings of other decisions of this Court are wholly inconsistent with a good-faith proposal.

2. Although the good-faith proposal is couched as a mere exception to the exclusionary rule, particularly in warrant cases, the proposal will actually serve to obliterate the rule. In the process, the good-faith proposal will threaten the very survival of the Fourth Amendment itself in four key respects.

a. The good-faith proposal would erode the probable cause standard in warrant cases by countenancing the regular use of evidence seized without probable cause. Under the proposal, except in egregious cases, the only qualification for admission of evidence at trial would be the existence of a warrant; no longer would the requirement that the warrant be based on probable cause be determinative. This would announce to our citizenry that the words and meaning of

the Fourth Amendment are no longer sacred, and that courts have legitimized unconstitutional seizures by permitting the routine introduction of the fruits of such seizures.

Moreover, by changing the focus from probable cause to simply obtaining a warrant, the proposal would encourage police violation of the Fourth Amendment. A system of magistrate-shopping would replace an internal police review process designed to review warrant applications for probable cause. In the end, for the police officer seeking a warrant, the question will no longer be what he knows, but who he knows.

b. The adoption of a good-faith proposal would "stop dead in its tracks judicial development of Fourth Amendment rights." *United States v. Peltier*, 422 U.S. 531, 554 (Brennan, J., dissenting). This is because trial courts will not reach the Fourth Amendment issues if they deem the evidence admissible under a good-faith exception. Indeed, the case and controversy requirement of Article III, section 2 of the Constitution forbids unnecessary consideration of constitutional questions. Also, practically, federal trial courts already overburdened with excessive caseloads will not engage in intellectual exercises into the complexities of search-and-seizure law. Without resolution of search-and-seizure issues below, appellate courts will not add to the development of Fourth Amendment law.

c. The inevitable result of freezing Fourth Amendment development will be the obfuscation of bright-line rules to guide police conduct. This would deprive police officers of needed guidance as to what actions are constitutionally impermissible. Moreover, in the absence of clear rules of conduct, almost all police actions will eventually be upheld as taken in the "reasonable good-faith" belief in their legality. Ultimately, instead of encouraging compliance with the Fourth Amendment, the good-faith proposal would result in widespread police avoidance of its mandate.

d. In warrant cases, the good-faith proposal would create a "super-magistrate" insulated from judicial review and

not deterred from authorizing searches on less than probable cause. Petitioner has argued that deterrence of magistrates is unnecessary, and that evidence seized pursuant to a defective warrant should, nevertheless, be admissible, for exclusion of the evidence would not deter police misconduct. Since, except in egregious cases, the existence of a warrant would sustain a good-faith finding, and the suppression judge will not reach the Fourth Amendment issues, the decision of the magistrate would routinely escape the rigours of judicial scrutiny.

The super-magistrate syndrome implicit in a good-faith scheme would be intolerable. Deterrence of magistrates issuing search warrants on less than probable cause is as essential to the promotion of Fourth Amendment compliance as is police deterrence. Moreover, the Fourth Amendment imperative of preventing searches and seizures without probable cause as a bulwark against unlawful invasions of privacy would soon dissipate without judicial review. If our system is to operate effectively, courts must have authority to inform magistrates that issuance of defective warrants will not be tolerated.

3. In addition to its constitutional infirmities, the good-faith proposal is simply bad policy. It is unnecessary, untimely and impractical and should be firmly rejected.

a. The good-faith proposal is unnecessary and redundant, as the probable cause standard accounts for a police officer's "reasonable mistake." Probable cause is not negated if the facts presented by the officer to the magistrate are inaccurate (as long as the officer reasonably believed them to be true) or if the assessment that the search would produce evidence of crime was in error. However, the proposal seeks to take the analysis one step further, and justify a search lacking in probable cause on the basis that the police acted with a "reasonable unreasonable belief" — an argument obvious in its incongruity.

b. Petitioner's good-faith proposal as it applies to warrant cases is particularly troubling in light of the Court's

recent decision in *Illinois v. Gates*, 103 S.Ct. 2317 (1983). With that decision, the Court has markedly facilitated the ability of police officers to obtain search warrants and significantly diminished the possibility, already rare, that the issuing magistrate's decision will be overturned on review. Indeed, to show a "substantial basis" that a "fair probability" existed that a search would be fruitful is not a difficult test to meet. To now impose a good-faith standard in view of the effects of *Gates* on the probable cause requirement would be to create a "double dilution" of the Fourth Amendment.

c. In recent decisions, this Court has limited the applicability of the exclusionary rule by restricting the scope of the Fourth Amendment and by narrowing the circumstances in which the rule may be employed. For example, the Court has adopted a restricted view of the right to privacy in cases pertaining to electronic surveillance, pen registers and bank records. It has similarly held that the Fourth Amendment warrant requirement does not pertain to certain police searches based on less than probable cause made of stopped automobiles and containers found therein. Where no violation of the Fourth Amendment is found, the exclusionary rule is, of course, inapplicable.

In other decisions, the Court has specifically narrowed the circumstances where the exclusionary rule may be applied in the face of Fourth Amendment violations. The rule is not applicable in certain proceedings collateral to the criminal trial (grand jury proceedings, civil proceedings to collect federal wagering taxes, and habeas corpus proceedings brought by state prisoners where Fourth Amendment issues were litigated below) and for certain purposes at the criminal trial (impeachment of defendant). Moreover, the rule may be invoked to exclude evidence at trial only by those defendants having an expectation of privacy in the premises illegally searched.

These decisions demonstrate the current inappropriateness of a good-faith proposal. First, the cumulative effect

of limiting the applicability of the exclusionary rule is to diminish its ability to deter police misconduct. This is primarily because police have an increasing number of possibilities for use of illegally-seized evidence so they are more willing to chance violation of the Fourth Amendment. Furthermore, the Court's approach to modification of the exclusionary rule provides needed flexibility and moderation, and is more prudent than an obliteration of the rule resulting from a good-faith proposal.

d. The practical application of a good-faith test would promote police ignorance and impose an administrative burden on suppression judges. Because the reasonableness of the officer's actions would be determinative, the more ignorant the officer is of the applicable law, the more likely would his unconstitutional acts be deemed reasonable. Apparently recognizing this problem, petitioner has proposed adoption of an "objective reasonableness" standard wherein the subjective intent of the officer would not be of issue. Despite its contrary intentions, an objective reasonableness standard would not only fail to cure the problem, it would create an intolerable burden on suppression judges.

Despite the objective inquiry, the subjective component would inevitably surface. The particular officer would be asked to explain his unconstitutional conduct and the subjective minds of police brass and officers responsible for training would be probed to determine the reasonableness of the officer's actions. Moreover, the defendant seeking to prove bad faith would likely call other witnesses, such as law professors and criminal law practitioners, to demonstrate what would be expected of a reasonably well-trained police officer,

The objective reasonableness test would place an intolerable burden on suppression judges. The time-consuming and difficult determination as to what would be expected of a reasonably well-trained officer would not be the only added component of the suppression hearing. Because, under the standard, the exclusionary rule would be applicable

where the magistrate reviewing a warrant application egregiously erred, the judge would have to determine the degree of the error — egregious or moderate — and what would be expected of a reasonably competent magistrate. This determination would be cumbersome, additionally time-consuming and would serve to actually modify the probable cause standard.

e. Finally, if modification of the exclusionary rule is the objective, it is a task more appropriately delegated to Congress, where full debate on the issue has already begun. If new legislation is adopted, the Court will simply rule on the constitutionality of the statute, as opposed to present circumstances where the Court is being urged to essentially write the statute itself.

4. A cost-benefit analysis of the exclusionary rule as it is applied to suppress evidence pertaining to proof of guilt at trial shows more benefit than cost.

a. Although, as the Court has recognized, empirical proof of the exclusionary rule's deterrence is not available, experience with the rule has demonstrated its ability to deter unconstitutional conduct. The deterrence accomplished by the exclusionary rule is "systemic deterrence" — deterrence of police, of magistrates and of prosecutors from pursuing action violative of the Fourth Amendment. The rule has caused police to obtain search warrants, to increase training of field officers and to engage in working relationships with prosecutors — all in an effort to avoid suppression of evidence by ensuring compliance with the Fourth Amendment. Furthermore, in warrant cases, the magistrate scrutinizes the warrant application, knowing that his decision concerning probable cause will be reviewed at a suppression hearing; and the magistrate is guided by appellate decisions also made possible by the exclusionary rule. Indeed, the Court's expressed justifications for the exclusionary rule have recognized the need for systemic deterrence of Fourth Amendment violations to preserve judicial integrity and maintain popular trust in government.

The exclusionary rule is the only effective means to ensure Fourth Amendment compliance. The experience in states without the exclusionary rule between *Wolf* (338 U.S. 25 (1949)) and *Mapp* (367 U.S. 643 (1961)) demonstrated the futility of relegating Fourth Amendment protection to remedies other than the exclusionary rule. With the Court's decision in *Mapp*, police departments modified drastically their procedures and policies and retrained their officers as if the Court had just created the Fourth Amendment. Moreover, the remedies currently available to redress Fourth Amendment violations — *e.g.* criminal prosecution, federal injunction or damage action against the perpetrating officer or his agency — lack the capacity to cause a police officer seeking to apprehend a criminal to comply with the dictates of the Fourth Amendment.

b. The costs of the exclusionary rule pale in the face of its substantial benefits.

First, petitioner contends that the rule deprives the courts of relevant and trustworthy evidence and therefore results in the freeing of guilty persons. Fundamentally this argument is misdirected. It is not the exclusionary rule, but the Fourth Amendment, which prohibits police from making unreasonable searches and seizures — a balancing made by the founders between the concern for privacy and the need for law enforcement at the expense of truth-finding. Moreover, in practice, empirical studies indicate that few prosecutions are declined for Fourth Amendment reasons and in cases where suppression motions are filed, they are seldom granted. Therefore, the exclusionary rule actually has only minimal impact on the freeing of seemingly guilty persons.

Moreover, petitioner claims that the exclusionary rule serves to lessen public respect for the judicial system. Again, if the public holds the rule accountable for the woes of the system, it is misinformed, for it is not the rule, but the Fourth Amendment, which makes the police officers' acts illegal. In any event, the unpopularity of judicial decisions

has never been a sound reason to compromise the independence of the judiciary and change such decisions. Actually, the exclusionary rule promotes public security and confidence in government, for it stands as an official model of the government's refusal to tolerate police illegality.

Other so-called costs of the exclusionary rule claimed by petitioner merit brief comment. The exclusionary rule does not burden the judicial system by encouraging the filing of suppression motions. Without such filings, Fourth Amendment rights would not be enforced and articulated in court decisions. In fact, the judicial system would be intolerably burdened by the expanded complexity and duration of suppression hearings resulting from a good-faith proposal. Furthermore, petitioner's claim that the exclusionary rule fails to remedy innocent victims does not suggest that the rule is not a necessary remedy, only that it is not a sufficient one. The rule does decrease the amount of potential innocent victims by giving police incentive to restrict intrusive activity. Also, petitioner's claim that the rule chills police investigation should again be directed at the Fourth Amendment. The very gravity of the sanction of exclusion provides greater incentive for police to comply with the Fourth Amendment. Finally, petitioner claims the rule threatens the Fourth Amendment because judges are reluctant to free the guilty. The Fourth Amendment is not threatened by the exclusionary rule, it is enforced by it. Rather, the Amendment is threatened by police who invade privacy and by courts, hopefully few, which ignore the dictates of the Amendment and render decisions contrary to law.

## ARGUMENT

### **I. WHERE THE GOVERNMENT SEEKS TO PROVE GUILT AT A FEDERAL CRIMINAL TRIAL WITH ILLEGALLY-SEIZED EVIDENCE, THE EXCLUSIONARY RULE IS CONSTITUTIONALLY-COMPELLED, AND THE COURT HAS REJECTED, DIRECTLY AND IMPLICITLY, A GOOD-FAITH MODIFICATION OF THE RULE**

For nearly seventy years, the government has been barred from proving a defendant's guilt at a federal criminal trial

with evidence seized by federal law enforcement officers in violation of the Fourth Amendment. The government now urges the Court to permit use of such evidence if the unconstitutional seizure was due to a good-faith, reasonable mistake of the officer. The theoretical justification for petitioner's good-faith proposal is that the exclusionary rule is judicially-created, not constitutionally-compelled, and therefore this Court can so modify the rule if warranted by a cost-benefit analysis.

We submit that where the government seeks to prove guilt at a federal criminal trial with illegally-seized evidence, the exclusionary rule is constitutionally-compelled. The rule is both rooted in the Fourth Amendment and Fifth Amendment privilege against self-incrimination and is a constitutional remedy essential to enforcement of the Fourth Amendment. Moreover, some decisions of this Court have directly rejected a good-faith proposal. And the reasoning and holdings in other decisions of the Court are wholly inconsistent with adoption of such a proposal.

#### **A. The Origin And Development Of The Exclusionary Rule Demonstrate Its Constitutional Imperative**

The exclusionary rule is constitutionally-compelled where the government seeks to prove guilt at trial with illegally-seized evidence. The origin and development of the rule demonstrate its constitutional nature in two respects. First, the rule is rooted in the Fourth Amendment right against unreasonable search and seizure and the Fifth Amendment privilege against self-incrimination when viewed in conjunction with the Fourth Amendment. *See, Kamisar, Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?* 16 Creighton L. Rev. 565, 621-27 (1982-1983); Schrock and Welsh, *Up From Calandra; The Exclusionary Rule as a Constitutional Requirement*, 59 Minn. L. Rev. 251, 271-307 (1974). Second, the rule is a constitutional remedy essential to enforcement of the Fourth Amendment. Stewart,

*The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, 1383-89 (1983).<sup>1</sup>

1. This Court in *Mapp v. Ohio*, 367 U.S. 643, 656-57 (1961) recognized that the exclusionary rule is an "essential part" of the Fourth Amendment. This position finds support as early as the Court's decision in *Weeks v. United States*, 232 U.S. 383 (1914), where the Court held that in a federal prosecution, the Fourth Amendment barred the use of evidence secured through an illegal search and seizure. It explained that exclusion was mandated to give meaning to the Fourth Amendment; for without exclusion, the "protection of the 4th Amendment, declaring [the citizen's] right to be secure against such searches and seizures, is of no value, and, . . . might as well be stricken from the Constitution." *Weeks*, 232 U.S. at 393. In the years between *Weeks* and *Mapp*, the exclusionary rule was deemed part and parcel of the Fourth Amendment and was used to bar illegally seized evidence in federal prosecutions. The observation made by the Court in *Olmstead v. United States*, 277 U.S. 438 (1928) was accurate: "The striking outcome of the *Weeks* case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction if obtained by government officers through a violation of the Amendment" (*id.* at 462).<sup>2</sup> Indeed, the Court left no doubt in *Mapp* that "the

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<sup>1</sup>This article, authored by former Associate Justice Potter Stewart, is scheduled to be published at approximately the time of the filing of this Brief.

<sup>2</sup>Other cases reached similar conclusions. E.g., *Breithaupt v. Abram*, 352 U.S. 432, 434 (1957) ("It has been clear since *Weeks* (citation omitted) that evidence obtained in violation of rights protected by the Fourth Amendment to the Federal Constitution must be excluded in federal criminal prosecutions); *Goldstein v. United States*, 316 U.S. 114, 120 (1942) (Evidence obtained in violation of the Fourth Amendment cannot be introduced "for the reason that otherwise the policy and purpose of the amendment might be thwarted."); See also *McNabb v. United States*, 318 U.S. 332, 339-340 (1943) ("[a] conviction in the federal courts, the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand").

*Weeks* rule is of constitutional origin." *Mapp*, 367 U.S. at 649. See *United States v. Calandra*, 414 U.S. 338, 355 (1974) (Brennan, J., dissenting).

The exclusionary rule has not only been linked to the Fourth Amendment, it has been given constitutional basis in the Fifth Amendment privilege against self-incrimination. Mr. Justice Black in his decision in *Mapp* pronounced: "... when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule." *Mapp*, 367 U.S. at 662 (Black J., concurring) (emphasis added).<sup>3</sup>

Justice Black's interpretation of the exclusionary rule is supported by decisions of this Court from *Boyd* to *Mapp*. In *Boyd v. United States*, 116 U.S. 616 (1886) the federal government sought the production of an invoice of allegedly illegally-imported goods for purposes of forfeiture. Objection was raised that such production constituted a search prohibited by the Fourth Amendment. The Court, per Justice Bradley, agreed and held that the fruits of the search must be excluded as evidence. The Court reasoned:

For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always

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<sup>3</sup>This pronouncement of Justice Black is particularly noteworthy in light of the petitioner's contention that the exclusionary rule is a "judicially-created remedy" that may be modified to permit introduction of illegally-seized evidence to prove guilt at trial. The notion that the rule was "judicially-created" derives from a statement made by Justice Black in his concurring opinion in *Wolf v. Colorado*, 338 U.S. 25, 39-40 (1949), twelve years prior to *Mapp*. And, it is this statement upon which the Court has recently relied to reject expansion of the exclusionary rule in collateral proceedings. See, e.g. *United States v. Calandra*, 414 U.S. 338, 348 (1974). But as will be argued herein, and as is emphasized by Justice Black's reasoning in *Mapp*, petitioner erroneously relies on the restricted applicability of the exclusionary rule in collateral proceedings to justify the introduction of illegally-seized evidence at trial. The error of the contention is underscored by the fact that exclusion of such evidence at trial, where self-incrimination is greatest, is mandated by the Fifth Amendment.

made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; . . . And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.

*Boyd*, 116 U.S. at 633.

Moreover, in two cases immediately following *Weeks*, the Court solidified the Fifth Amendment basis of the exclusionary rule. In *Gouled v. United States*, 255 U.S. 298 (1921) the government had seized papers during an illegal search. In suppressing the evidence, the Court characterized exclusion of illegally-seized evidence as a "constitutional right", (*id.* at 313) and held that admission of papers seized in violation of the Fourth Amendment violated the Fifth Amendment (*id.* at 312-313). Similarly, in *Agnello v. United States*, 269 U.S. 20 (1925), the Court extended the exclusionary rule's application from papers to cocaine. In holding that a defendant was not required to move before trial for suppression of cocaine seized in violation of the Fourth Amendment, the Court explained that in making such motion the defendant would have improperly forfeited his Fifth Amendment privilege against self-incrimination. (*id.* at 34). In the years following *Gouled* and *Agnello*, the Court continued to justify the exclusionary rule in terms of the Fifth Amendment.<sup>4</sup>

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<sup>4</sup>See, e.g. *McGuire v. United States*, 273 U.S. 95, 99 (1927) ("The Fourth and Fifth Amendments protect every person from the invasion of his house by federal officials without a lawful warrant and from incrimination by evidence procured as a result of the invasion"). In *Davis v. United States*, 328 U.S. 582, 587 (1946), the Court explained: The law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of the [Fourth and Fifth Amendments] . . . It reflects a dual purpose — protection of the privacy of the individual, his right to be let alone; protection of individual against compulsory production of evidence to be used against him. (citations omitted).

2. The exclusionary rule is not only rooted in the Fourth and Fifth Amendments, it is a constitutionally-compelled remedy where the government seeks to prove guilt at trial with evidence seized in violation of the Fourth Amendment. Justice Clark, writing for the majority, pronounced in *Mapp* that the exclusionary rule is

a clear, specific and constitutionally required — even if judicially implied — deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to a ‘form of words’.

*Mapp*, 367 U.S. at 648, quoting *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (Holmes, J.). Although the strict wording of the Fourth Amendment is couched in terms of rights, not remedies,<sup>5</sup> the framers of the constitution no doubt intended the rights to be more than a code of ethics without legal enforcement. Indeed, in the years between *Boyd* and *Mapp*, this Court fashioned the exclusionary rule to enforce the Fourth Amendment’s prohibition against unreasonable searches and seizures “by removing the incentive to disregard it.” *Elkins v. United States*, 364 U.S. 206, 217 (1960).

The need for an appropriate enforcement of the Fourth Amendment is demonstrated by its history. The Fourth Amendment was proposed by the First Congress and enacted by the states to ensure that the individual would be secure from unreasonable government intrusion. Indeed, when the Constitutional Convention met in 1787 considerable opposition to ratification was voiced in light of the omission of a bill of rights and specifically a provision addressing searches. See N. Lasson, *The History and Development of*

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<sup>5</sup>The Fourth Amendment commands that the right of the people to be secure against unreasonable searches and seizures “shall not be violated” but is silent about how to remedy violation of the right. The fact that the Fourth Amendment does not specifically provide for an exclusionary rule is probably attributed to the framers’ belief “that by thus controlling search warrants they had controlled searches”. *Harris v. New York*, 331 U.S. 145, 196 (1947) (Jackson J., dissenting). See Kamisar, *supra*, 16 Creighton L. Rev. at 578.

the Fourth Amendment to the United States Constitution, at 92-96 (reprinted 1970). The colonists sought to ensure that the government's arbitrary power of search exercised in the form of general warrants in England and writs of assistance in the colonies be restricted by the new Constitution.<sup>6</sup>

The "central objectionable feature" of both the general warrants and writs of assistance was that "they provided no judicial check" on the discretion of governmental officials. *Steagald v. United States*, 451 U.S. 204, 220 (1981). See Kamisar, *supra*, 16 Creighton L. Rev. at 565. A basic purpose of the Bill of Rights, particularly the Fourth Amendment is "subordinat[ing] police action to legal restraints." *United States v. Rabinowitz*, 339 U.S. 56, 82 (1950) (Frankfurter, J., dissenting). As Professor Amsterdam has noted, "the fourth amendment is quintessentially a regulation of the police" — "in enforcing the fourth amendment, courts must police the police." Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 371 (1974). And in Justice Stewart's view, the exclusionary rule is a constitutionally-required remedy, "necessary to keep the right of privacy secured by the fourth amendment from 'remain[ing] an empty promise' " [*Mapp*, 367 U.S. at 660] because it is the *only* remedy that "inspires the police officer to channel his enthusiasm to apprehend a criminal toward the need to comply with the dictates of the fourth amendment." Stewart, *supra*, 83 Colum. L. Rev. at 1389.

**B. A "Good Faith" Proposal To Modify Application Of The Exclusionary Rule In The Criminal Trial Setting Has Been Directly And Implicitly Rejected By This Court**

1. As early as 1959, this Court expressly rejected the argument that the good faith of the arresting officer can substitute for probable cause. See *Henry v. United States*,

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<sup>6</sup>In reference to the writs of assistance James Otis pronounced that they were "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law that was ever found in an English law book." John Adams was later to comment of the 1761 debates which produced Otis' proclamation "then and there was the . . . first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born." *Boyd v. United States*, 116 U.S. 616, 625 (1886).

361 U.S. 98, 102 (1959) ("good faith on the part of arresting officers is not enough"). Indeed, the Court warned that if "subjective good faith alone were the test, the protections of the fourth amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects', only in the discretion of the police." *Beck v. Ohio*, 379 U.S. 89, 97 (1964). See also *Taylor v. Alabama*, 102 S.Ct. 2664, 2669 (1982) ("To date, we have not recognized such [a "good-faith"] exception. . ."). Moreover, significant decisions of this Court refining Fourth Amendment protections would be rendered meritless under petitioner's proposed reasonable good-faith exception.

*Ybarra v. Illinois*, 444 U.S. 85 (1979) is a case in point. In *Ybarra*, the police arrived at a tavern to execute a search warrant. They conducted searches of patrons under the authority of an Illinois statute. Although the police had acted reasonably, the Court held the search unconstitutional and suppressed the evidence. Under a good-faith exception, *Ybarra* would have a contrary result. See also *Torres v. Puerto Rico*, 442 U.S. 465 (1979). Furthermore, in *Whiteley v. Warden*, 401 U.S. 560 (1971), the Court suppressed evidence despite the undisputed good faith of the arresting officers (*id.* at 569). There, based on a police radio bulletin advising the officers of an outstanding warrant, they arrested the defendants and seized stolen property during a vehicle search. The officers had no way of knowing that the affidavit underlying the warrant was insufficient. Although the officers made, unquestionably, a reasonable mistake, the Court suppressed the evidence, holding that the arrest and search violated the Fourth Amendment.<sup>7</sup>

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<sup>7</sup>In a wide range of other decisions, this Court has expanded the contours of the Fourth Amendment in ways that would be unforeseeable to police officers, and, therefore, unjustified under the good-faith exception. Yet the importance of these decisions to the advancement of Fourth Amendment protections cannot be denied. *E.g. Chimel v. California*, 395 U.S. 752 (1969) (search incident to arrest unreasonable if extends beyond immediate reach of arrestee); *Katz v. United States*, 389 U.S. 347 (1967) (eavesdropping constitutes search in absence of physical trespass); *Delaware v. Prouse*, 440 U.S. 648 (1979) (random

Finally, the Court's recent decision in *United States v. Johnson*, 102 S.Ct. 2579 (1982) precludes the adoption of a good-faith exception to the exclusionary rule. In *Johnson*, the Court held that the rule of *Payton v. New York*, 445 U.S. 573 (1980) — that, absent exigent circumstances, the police must obtain a warrant to make a home arrest — would be applied retroactively to mandate reversal of a conviction that had previously been obtained but had not become final when *Payton* was decided. The government, relying on language from *United States v. Peltier*, 422 U.S. 531 (1975) had argued that "the only Fourth Amendment rulings worthy of retroactive application are those in which the arresting officers violated pre-existing guidelines clearly established by prior cases." For only such rulings, the government contended, established "settled" law of which a police officer could "properly be charged with knowledge." *Johnson* at 2592-93.

The position of the United States in *Johnson* is remarkably similar to that proposed here. In *Johnson*, the government argued in substance that the officer's "reasonable mistake" in violating Fourth Amendment principles should permit admission of the evidence. However, the Court in *Johnson* rejected the argument on the ground that it would reduce the retroactivity doctrine "to an absurdity" since, "the Government's theory would automatically eliminate *all* Fourth Amendment rulings from consideration for retroactive application" (*id.* at 2593).

The same "absurdity" is pertinent to the government's reasonable good-faith proposal. Particularly in warrant cases,

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traffic stops are Fourth Amendment intrusions); *Payton v. New York*, 445 U.S. 573 (1980) (warrant required, absent exigent circumstances, to make arrest in home). "Although to one degree or another these decisions may have been prefigured by earlier opinions, they were sufficiently unforeseeable that the officers who searched Chimel's home, entered to arrest Payton . . . , eavesdropped on Katz, or stopped Prouse, all would pass a test of reasonable, good faith conduct." Mertens and Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating The Police and Derailing The Law*, 70 Geo. L.J. 365, 441 (1981).

the proposal would effectively eliminate application of the exclusionary rule to criminal trials (*see* pages 26-28, *infra*). The so-called exception to the rule would become the rule. Moreover, as the development of Fourth Amendment law is progressively impeded by the elimination of the exclusionary rule, the police officer's actions would become more and more "reasonable" in the absence of any "settled" law directing his actions (*see* pages 45-46, *infra*).

In addition, the *Johnson* Court also rejected the government's argument that application of *Payton* would not deter police illegality. The Court noted, with direct applicability to the proposed reasonable good-faith exception:

If, as the Government argues, all rulings resolving unsettled Fourth Amendment questions should be non-retroactive, then, in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior. Official awareness of the dubious constitutionality of a practice would be counter-balanced by official certainty that, so long as the Fourth Amendment law in the area remained unsettled, evidence obtained through the questionable practice would be excluded only in the one case definitively resolving the unsettled question. Failure to accord any retroactive effect to Fourth Amendment rulings would "encourage police or other courts to disregard the plain purport of our decisions and to adopt a let's-wait-until-it's-decided approach."

*id.* at 2593-94, *quoting Desist v. United States*, 394 U.S. at 277 (Fortas, J., dissenting) (footnote omitted).

Indeed, with the adoption of a reasonable good-faith exception, police officers would be encouraged to err on the side of conducting potentially unconstitutional searches and seizures, recognizing that their actions, although possibly violative of the Fourth Amendment, may, nevertheless, be deemed reasonable. Police will be encouraged to "disregard the plain purport of [the Court's] decisions and to adopt a let's-wait-until-it's-decided approach." This situation, found

intolerable by the Court in the retroactivity context, should be equally intolerable here. This is particularly so for the very survival of the Fourth Amendment is at stake.

2. At the heart of petitioner's theoretical justification for its cost-benefit approach are post-*Mapp* cases wherein the Court has refused to *extend* the exclusionary rule to circumstances *collateral* to proof of guilt at trial. The reasoning found in such cases belies the petitioner's proposal. Although the Court expressed skepticism that additional deterrence could be achieved through exclusion of evidence in such contexts, it consistently assumed that the exclusionary rule would be vigorously applied in the trial setting.

For example, in *United States v. Calandra*, 414 U.S. 338 (1974), the Court held that a witness before a federal grand jury was not privileged to refuse to answer questions on the ground that such questions were based upon illegally-seized evidence. The Court explained first that "[s]uppression of the use of illegally seized evidence against the search victim in a criminal trial is thought to be an important method of effectuating the Fourth Amendment" (*id.* at 350). But the Court reasoned that application of the exclusionary rule to the grand jury context would not likely deter unlawful police conduct because the "incentive to disregard the requirement of the Fourth Amendment solely to obtain an indictment from a grand jury is substantially negated by the *inadmissibility of the illegally seized evidence in a subsequent criminal prosecution of the search victim*" (*id.* at 351) (emphasis added). Accordingly, the underlying assumption in the Court's holding is that the exclusionary rule would be relied upon in the trial setting as the means by which police are deterred from unlawful activity.

Similarly, in *United States v. Janis*, 428 U.S. 433 (1976) the Court declined exclusion from federal civil proceedings evidence unlawfully seized by a state criminal enforcement officer. The Court explained that exclusion would not have a "sufficient likelihood of deterring the conduct of state police" (*id.* at 454). The Court recognized that the deter-

rence of the police would be achieved by excluding the illegally seized evidence in both the state and federal criminal trial. Again, the Court relied on the application of the exclusionary rule in the criminal trial setting as the underpinning of its decision.

The same underlying assumption is implicit in the Court's decision in *Stone v. Powell*, 428 U.S. 465 (1976). At issue in *Stone* was whether state prisoners — who have been afforded the opportunity for full and fair review of their search and seizures claims in the state trial and appellate court — may invoke their claim again on federal habeas corpus review. Although initially enumerating the "costs" implicit in an exclusionary rule (*id.* at 489-490), and recognizing the absence of empirical data demonstrating the deterrent effect of the rule, the Court relied on the availability of the rule in the trial setting to justify its refusal to extend it to the federal habeas arena. The Court reasoned that no additional deterrence of police misconduct could be achieved by the proposed extension of the rule since the "risk of exclusion of evidence at trial or the reversal of convictions on direct review . . ." already created the necessary disincentive (*id.* at 493). Again, preservation of the exclusionary rule in its present form in the trial setting was the underlying assumption of the Court's decision.

In each of these cases — *Calandra*, *Janis* and *Stone*, the Court's reasoning would have found no accommodation for petitioner's proposed reasonable good-faith exception. The Court's decisions would not have countenanced the introduction of illegally-seized evidence to prove guilt at trial.

## II. THE GOOD-FAITH PROPOSAL IS CONSTITUTIONALLY UNSOUND AS IT THREATENS THE SURVIVAL OF THE FOURTH AMENDMENT

At first glance, petitioner's good-faith exception to the exclusionary rule appears to seek a mere modification of the rule. But, under closer scrutiny, the widespread effects of the proposed exception are revealed. We submit that the

proposal will retire the exclusionary rule into extinction, and in the process threaten the very survival of the Fourth Amendment itself. In this sense, the good-faith proposal is dangerously unconstitutional and must be rejected.<sup>8</sup>

The good-faith proposal threatens the Fourth Amendment in four key respects. First, it would serve to erode the probable cause standard in warrant cases by condoning the regular use of evidence seized without probable cause at trial. Second, the proposal would "stop dead in its tracks judicial development of Fourth Amendment rights." *United States v. Peltier*, 422 U.S. 531, 554 (Brennan, J., dissenting). Moreover, the resulting obfuscation of bright-line rules to guide police conduct would mean the "right of the people would be secure . . . only in the discretion of the police." *Beck v. Ohio*, 379 U.S. 89, 97 (1964). Finally, the proposal would encourage the judicial officer reviewing warrant applications to authorize searches violative of the Fourth Amendment. The warrant process under a good-faith proposal would essentially create a "super-magistrate" not deterred from unconstitutional decisions and not subject to the scrutiny of judicial review.

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\*The good-faith proposal has been criticized by noted authorities. E.g., Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, 1399-1403 (1983); Kamisar, *Prepared Remarks (Pt. I) of Yale Kamisar at the Fifth Annual Supreme Court Review and Constitutional Law Symposium*, 33-46 (Sept. 23, 1983) (hereinafter "Constitutional Law Symposium") (a copy of these remarks has been lodged with the Court and reference to them was made in 52 U.S. Law Week at 2230-2231 (Oct. 25, 1983) and see also the remarks of Professor Kamisar and Judge Shirley Hufstедler at the American Bar Association, Criminal Justice Section debate, 33 Cr. L. Rptr. 2404, 2408-12 (Aug. 17, 1983); LaFave, *The Fourth Amendment In An Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. Pitt. L. Rev. 307, 352-59 (1982); Schlag, *Assaults On the Exclusionary Rule: Good Faith Limitations and Damage Remedies*, 73 J. Crim. L. and Criminology 875, 895-907 (1982); Mertens and Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 Geo. L.J. 365 (1981).

## A. Erosion Of Probable Cause

1. *The Courts.* Fundamental to the good-faith proposal is its countenance of the routine admission of unconstitutionally-seized evidence at trial. Here, petitioner urges that evidence seized without probable cause below be, nevertheless, admitted on the ground that the police officer acted in good-faith reliance on a warrant. Under the proposal, except in egregious cases, the only qualification for admission of evidence at trial would be the existence of a warrant; no longer would the very aspect of Fourth Amendment protections deemed most crucial for preservation of a free society, namely that "no warrant shall issue, but upon probable cause" be of concern.<sup>9</sup>

Courts routinely permitting the introduction of evidence seized in violation of the Fourth Amendment would announce to our citizenry that the words and meaning of the Amendment are no longer sacred. For if unconstitutionally-seized evidence is not excluded "it is difficult for the citizenry to believe that the government truly meant to forbid the conduct in the first place." Paulsen, *The Exclusionary Rule and Misconduct By The Police*, 52 J. Crim. L., Crim. & P.S. 255, 258 (1961). It is no answer to argue that it is not the courts but the police officer who has acted unconstitutionally. Deference should be paid to the charge of the Court in *Weeks v. United States*, 232 U.S. 383 (1914) that

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<sup>9</sup>The erosion of the probable cause standard was candidly recognized by a supporter of a good-faith exception upon whom petitioner relies (Pet. Br. 47, 78). Professor Edna Ball arguing for a weakened Fourth Amendment to unhandcuff police in their law enforcement efforts stated:

The good faith doctrine should not be judged by its effect on the exclusionary rule but by its effect upon the standards which define when citizens will be protected against government intrusion. To the extent that probable cause is the key to fourth amendment protections, the good faith exception diminishes the liberality of the fourth amendment. . . . In other words what it requires is no longer 'probable cause' as presently defined, but instead a 'reasonable ground for belief'.

Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. Crim. L. & Criminology 635, 655-656 (1978).

the "tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of courts which are charged at all times with the support of the Constitution. . ." (*id.* at 392). It is a distinction without substance to attempt to insulate courts from the unlawful activity of the police, since admission of the unconstitutionally-seized evidence makes the court a participant in the illegality.<sup>10</sup> Both the police who seized the evidence and the court which allowed its use are part of the "government's" approval of systemic lawlessness. The dangers of such a system are well-recognized.<sup>11</sup>

2. *The Police.* This Court has held that evidence must be excluded at the criminal trial if it encourages violations of the Fourth Amendment. See *United States v. Janis*, 428 U.S. 433, 458-59, n. 35 (1976). The use of unconstitutionally-seized evidence at trial under the good-faith proposal would encourage police to side-step Fourth Amendment restrictions. To the police who are "engaged in the often competitive enterprise of ferreting out crime," *Johnson v. United States*, 333 U.S. 10, 14 (1948), admissibility will be equated with legality, 1 W. LaFave, *Search & Seizure*, §1.2, p. 12 (Supp. 1983). As the Court stated in *Terry v. Ohio*, 392 U.S. 1, 13 (1968), "[a] ruling admitting ev-

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<sup>10</sup>Chief Justice Traynor observed:

When . . . the very purpose of an illegal search and seizure is to get evidence to introduce at trial, the success of the lawless venture depends entirely on the court's lending its hand and by allowing the evidence to be introduced. It is no answer to say that a distinction should be drawn between the government acting as law enforcer and the government acting as judge.

*People v. Cahan*, 44 Cal.2d 434, 445, 282 P.2d 905, 912 (1955).

<sup>11</sup>Mr. Justice Brandeis warned in *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting):

In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously . . . For good or for ill [our government] teaches the whole people by its example. Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for law, it invites every man to become a law unto himself; it invites anarchy.

idence in a criminal trial . . . has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur."

Under the proposal, police will no longer be primarily concerned with whether they have probable cause to search. Because evidence seized pursuant to a warrant will be admitted without probable cause, the police will change their focus accordingly. The proposal would reverse the present incentive for police "in close cases . . . to err on the side of constitutional behavior . . . and, rather, encourage police . . . to adopt a lets-wait-until-its-decided-approach." *United States v. Johnson*, 102 S.Ct. 2579, 2593-94 (1982). Moreover, since admission of evidence will turn, not on the existence of probable cause, but on whether the police found a magistrate willing to sign a warrant, a system of magistrate-shopping<sup>12</sup> will replace an internal police review process designed to review warrant applications for probable cause.<sup>13</sup> And, because, as will be shown, the magistrate's decision will not be subjected to the rigours of judicial review (see pages 29-32, *infra*) magistrates will become more inclined to comply with police requests for warrants.<sup>14</sup>

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<sup>12</sup>Under our existing system, some police already shop for the most sympathetic magistrates for presentation of their warrant applications. See L. Tiffany, D. McIntyre & D. Rotenberg, *Detection of Crime* 120 (1967). Under a good-faith proposal, magistrate shopping would increase substantially.

<sup>13</sup>An internal police review procedure is one of the aspects of systemic deterrence of conduct violative of the Fourth Amendment made possible by the exclusionary rule (see, pages 51-56, *infra*).

<sup>14</sup>Professor Wayne LaFave warns that adoption of the good-faith proposal would result in a pro-law enforcement bias in suppression rulings. LaFave, *The Fourth Amendment In An Imperfect World: On Drawing "Bright Lines" and "Good Faith"* 43 U.Pitt. L. Rev. 307, 357-58 (1982). Moreover, a leading opponent of the exclusionary rule expressed "no doubt" that under our present system "judges do misconstrue the Fourth Amendment and fudge the standards of probable cause, all in what they consider to be the overall good of justice and the community." Wilkey, *A Call For Alternatives to the Exclusionary Rule*, 62 *Judicature* 351, 356 (1979). The adoption of a "reasonableness" standard under a good-faith proposal, giving wide latitude to courts already inclined to admit evidence, will add insult to injury. The

(footnote continued on following page)

In the end, for the police officer seeking a warrant, the question will no longer be what he knows, but who he knows.

### **B. Freezing Judicial Development Of Fourth Amendment Law**

The development of Fourth Amendment law is a dynamic process. The contours of constitutionally-permissible police conduct are defined by court decisions interpreting the Amendment. At the center of this process is the exclusionary rule which provides defendants an incentive to raise the Fourth Amendment issues as a means of suppressing illegally-seized evidence. Professor Dallin Oaks, a critic of the exclusionary rule (Pet. Br. 41) recognized: "It is . . . imperative to have a . . . procedure by which courts can review alleged violations of constitutional rights and articulate the meaning of those rights. The advantage of the exclusionary rule — entirely apart from any direct deterrent effect — is that it provides an occasion for judicial review . . ." Oaks, *Studying The Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 756 (1970).

The adoption of a good-faith exception to the exclusionary rule would, as Justice Brennan forecasted, "stop dead in its tracks judicial development of Fourth Amendment rights." *United States v. Peltier*, 422 U.S. 531, 554 (1975) (Brennan, J., dissenting). This is because courts will not reach the Fourth Amendment issues if they deem the evidence admissible under a good-faith exception. And defendants, interested in prevailing in their own cases and not advancing abstract points of law to benefit others, will not pursue Fourth Amendment challenges.

The courts' anticipated avoidance of the Fourth Amendment issues is supported by precedent and practicality. In-

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practice of judges merely "rubber stamping" police warrant applications will become commonplace, contrary to the admonitions of this Court that "the magistrate [must] perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police." *Aguilar v. Texas*, 378 U.S. 108, 111 (1964).

deed, "there is clear precedent for avoiding decision of a constitutional issue raised by police behavior when in any event the evidence [is] admissible in the particular case at bar." *Peltier*, 422 U.S. at 555, n. 14 (Brennan, J., dissenting). The case and controversy requirement of Article III, section 2 of the Federal Constitution would prohibit a court from deciding the constitutional question if it had deemed the evidence admissible under a good-faith exception. See *Bowen v. United States*, 422 U.S. 916, 920 (1975) (Supreme Court cautioned federal district and appellate courts against deciding Fourth Amendment issues when the retroactivity question resolved the case, noting its "reluctance to decide constitutional questions unnecessarily."); see also *Defunis v. Odegaard*, 416 U.S. 312, 316 (1974) ("federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them."); *Stovall v. Denno*, 388 U.S. 298, 301 (1967) (Article III precludes announcing rule of law purely prospectively without application to case in which rule is announced.)

Moreover, from a practical viewpoint, federal trial courts are not likely to resolve Fourth Amendment issues when the evidence is, nevertheless, admissible. As petitioner has acknowledged, trial courts are already burdened by increasing caseloads. To expect them to engage in intellectual exercises into the complexities of Fourth Amendment law is to ignore present day realities. Moreover, where the trial court has not reached the Fourth Amendment issues, the appellate court will not add to the development of Fourth Amendment law.<sup>15</sup>

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<sup>15</sup>The accuracy of this projection is highlighted by two cases which have adopted a good-faith analysis. In *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980) cert. denied 449 U.S. 1127 (1981), thirteen judges considered it unnecessary to determine if the arrest was illegal, since "evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions taken in good faith. . . ." (*id.* at 840). Also, in *Richmond v. Commonwealth*, No. 80-CA-1366-MR (Ky. Ct. App., July 31, 1981), *aff'd on other grounds*, 637 S.W.2d 642 (Ky. 1982), the court refused to decide the constitutional issue — whether the judge had authority to issue a warrant outside his territorial jurisdiction — because, it concluded, suppression of the evidence was precluded under a good-faith rationale.

Petitioner leaves open the possibility (perhaps the hope), that courts will resolve significant Fourth Amendment issues even when the good-faith exception determines the outcome (Pet. Br. 83-84). But, as Professor LaFave points out, supporters of the good-faith exception would be expected to press for elimination of Fourth Amendment resolution once the exception was adopted. LaFave, *supra*, 43 U. Pitt. L. Rev. at 355. In sum, under a good-faith scheme, the history of this Court's refinement of Fourth Amendment law would be left virtually frozen in time, abandoned to atrophy in its obsolence.

### **C. Obfuscation Of Bright-Line Rules Guiding Police Conduct**

The inevitable result of freezing Fourth Amendment development is the obfuscation of bright-line rules to guide police conduct. This will have a dual effect. First, it will deprive police officers of needed guidance as to what actions are constitutionally impermissible. This is contrary to the Court's development of a process of bright-line categorization to permit greater police compliance with the Fourth Amendment. See *e.g. United States v. Ross*, 456 U.S. 798 (1982). Second, in the absence of clear rules of conduct, almost all police actions will be found "reasonable," and the citizenry will be protected by the Fourth Amendment "only in the discretion of the police." See Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 394 (1974).

This is an ultimate paradox of the good-faith proposal. "[I]nstead of encouraging the development of unequivocal standards to guide the police and to operate as ready benchmarks for the bad faith determination, the good faith analysis will cause courts to gravitate away from rule-oriented adjudication." Ashdown, *Good Faith And The Exclusionary Remedy*, 24 Will & Mary L. Rev. 335, 361-62 (1983). As police become increasingly ignorant of Fourth Amendment requirements, they will increasingly act in "good-faith."

Ultimately, instead of encouraging compliance with the Fourth Amendment, the good-faith proposal will promote its violation and eventual obliteration.

### **D. Creation Of A Super-Magistrate Insulated From Judicial Review**

Petitioner's good-faith proposal is premised on its assumption that the "paramount and perhaps sole purpose" (Pet. Br. 18) of the exclusionary rule is the deterrence of unlawful police conduct. Petitioner contends that deterrence of magistrates issuing warrants is unnecessary (Pet. Br. 59), and that evidence seized pursuant to a warrant based on less than probable cause should be admissible since the police necessarily acted in good faith. We submit that judicial deterrence is essential to the furtherance of Fourth Amendment compliance. A magistrate issuing search warrants on less than probable cause, either through design or ignorance of the law, must not be tolerated. However, the good-faith proposal promotes magistrate error by foreclosing judicial review of the warrant decision. The proposal, in effect, creates a "super-magistrate" insulated from judicial scrutiny.

Judicial deterrence is as essential to the promotion of Fourth Amendment compliance as is police deterrence. This Court emphasized as early as *Weeks*, 232 U.S. at 394, that:

the 4th Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers acting under legislative or *judicial* sanction. (emphasis added)

Thus,

any rule intended to prevent Fourth Amendment violation must operate not only upon individual law enforcement officers but also upon those who set policy for them and approve their actions. Otherwise, for example, evidence derived from any search under a warrant could be admissible, because the searching policemen having had a warrant approved by the

designated judicial officer, had every reason to believe the warrant valid.

*United States v. Peltier*, 422 U.S. at 558-59, n. 18 (Brennan, J., dissenting).

A judicial officer who issues a search warrant lacking in probable cause violates a citizen's constitutional rights as surely as the police officer executing it. That judicial officer must be deterred from committing Fourth Amendment violations in the case at hand and in future cases. Indeed, this Court has frequently focused its attention on the conduct of the judicial officer issuing the warrant rather than on the police officer preparing the application. See, e.g. *Stanford v. Texas*, 379 U.S. 476 (1965); *Aguilar v. Texas*, 378 U.S. 108 (1964); *Nathanson v. United States*, 290 U.S. 41 (1933). Yet, under a good-faith proposal, judicial deterrence is not feasible in the absence of judicial review of the magistrate's warrant decision.

Indeed, a particularly troubling aspect of the good-faith proposal is its creation of a "super-magistrate" whose warrant decisions would not be subjected to judicial review. Although a magistrate's probable cause determination is to be afforded deference, it would be untenable to create a system which isolates it from further judicial scrutiny. Mr. Justice Rehnquist, writing for the majority in *Illinois v. Gates*, 103 S.Ct. 2317, 2332 (1983), recently articulated:

Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusion of others. In order to ensure that such an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued. (emphasis added)

The Fourth Amendment imperative of preventing searches and seizures without probable cause as a bulwark against unlawful invasions of privacy would soon dissipate without judicial review. See, *Franks v. Delaware*, 438 U.S. 154, 169 (1978) ("it is the *ex parte* nature of the initial hearing

... that is the reason for review.'')<sup>16</sup> Indeed, a principal reason for affording judicial officers immunity has been the availability of appellate review of their decisions. *See, Bradley v. Fisher*, 13 Wall (80 U.S.) 334, 354 (1872); *Stump v. Sparkman*, 435 U.S. 349, 369 (1978) (Powell, J., dissenting). In light of our system's need to subject judicial decisions exceeding constitutional limits to review, *Rose v. Mitchell*, 443 U.S. 545 (1979), the super-magistrate syndrome associated with the good-faith proposal must be solidly rejected. Decisions pertaining to precious Fourth Amendment freedoms cannot be shrouded from the light of judicial review if the Fourth Amendment is to survive.

Justice Potter Stewart recently articulated his opposition to a good-faith exception to the exclusionary rule. With reference to the lack of judicial review of the magistrate's warrant decision, Justice Stewart cautioned that:

if the fourth amendment's probable cause requirement is to be enforced, reviewing courts must have the authority on occasion to inform magistrates in a meaningful way that warrants based on something less than probable cause are not to be tolerated.

Stewart, *supra*, 83 Colum. L. Rev. at 1403. Justice Stewart noted that proponents of the good-faith exception have argued that a reviewing court could determine whether a search warrant was supported by probable cause even if a good faith proposal were adopted. As previously argued, the prospect of a reviewing court providing moot articulations of Fourth Amendment law is both constitutionally and practically *de minimis*. Justice Stewart apparently would agree and further pointed out that even in cases where a court admits evidence obtained in good faith while declaring the

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<sup>16</sup>Professor LaFave agrees that the lack of judicial review associated with a good-faith proposal would "create an additional incentive to infringe on Fourth Amendment rights." He explains that encouragement of magistrate shopping would inevitably result if both "police and magistrates knew that whatever search and seizure activity was authorized by a warrant could in no way be challenged in a criminal prosecution." LaFave, *supra*, 43 U. Pitt. L. Rev. at 353-54.

warrant lacking in probable cause,

the magistrate may receive an opinion, perhaps years after signing the warrant informing him that a mistake was made. But there is no incentive — apart from a professional desire to comply with the fourth amendment — for that magistrate to refrain from repeating the same mistake in the future or from granting any colorable request for a search warrant.

Stewart, *supra*, 83 Colum. L. Rev. at 1403.

Indeed, decisions concerning Fourth Amendment freedoms must not be left to the whims of a judicial officer insulated from judicial review. The prospect of abusive magistrate shopping is heightened by the realization that the officer need not be a lawyer or have any legal training. See *Shadwick v. City of Tampa*, 407 U.S. 345 (1972). The magistrate must be informed when his/her decisions do not comport with Fourth Amendment requirements and through a process of judicial review, all magistrates must be deterred from committing similar errors in the future. This is how the Fourth Amendment has maintained its vitality through the years. Its continued existence, however, is threatened by the creation of a super-magistrate implicit in a good-faith formulation.

### **III. THE GOOD FAITH PROPOSAL IS UNNECESSARY, UNTIMELY AND IMPRACTICAL AND SHOULD BE REJECTED ON POLICY GROUNDS**

In addition to the constitutional infirmities of the good-faith proposal, it should be rejected on policy grounds. First, the proposal is unnecessary since the probable cause standard accounts for the “reasonable mistake” of the police officer. Moreover, in the post-*Gates* era, adoption of a good-faith proposal would create a “double dilution” of the probable cause standard in warrant cases leading to its demise. In addition, the Court has recently limited the applicability of the exclusionary rule by restricting the scope of the Fourth Amendment and narrowing the circumstances in

which the rule may be invoked; therefore, the more drastic approach of the good-faith proposal to modify the rule into extinction is inappropriate. Furthermore, the practical application of the proposal would promote police ignorance and impose an awesome administrative burden on suppression judges. Finally, it appears that modification of the exclusionary rule, if that be the objective, is more appropriately a legislative task, and Congressional debate, already ongoing, should be encouraged to continue.

**A. The Good-Faith Proposal Is Unnecessary And Redundant As Probable Cause Accounts For A Police Officer's Reasonable Mistake**

Petitioner proposes that when a "reasonably well-trained" police officer makes a "reasonable mistake" in his belief that a search comported with the Fourth Amendment, the fruits of that search should be admissible to prove guilt, despite the fact that the search lacked probable cause. Petitioner's proposal, if it has any merit in other contexts, has no merit where the Fourth Amendment violation at issue is that of probable cause.

"Probable cause" strikes a compromise between the citizen's right to personal liberty and the need of law enforcement to protect the community. "The substance of all the definitions" of probable cause "is a reasonable ground for belief of guilt." *Brinegar v. United States*, 338 U.S. 160, 175 (1948), quoting *Carroll*, 267 U.S. at 161. Probable cause is a "practical, non-technical conception," *Illinois v. Gates*, 103 S.Ct. 2317, 2328 (1983), dealing with the "factual and practical considerations of everyday life on which reasonable and prudent men, not technicians act." *Brinegar*, 338 U.S. at 175. Probable cause is indeed a fluid concept.

Ingrained in the probable cause standard is allowance for the reasonable mistakes of police officers in assessing probabilities. The Court in *Brinegar* explained:

Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on

their part. But the *mistakes must be those of reasonable men*, acting on facts leading sensibly to their conclusions of probability. (*id.* at 176) (emphasis added).

Accordingly, probable cause is not negated if the facts presented by the officers to the magistrate turn out to be inaccurate (as long as the officers reasonably believe them true) or if the assessment that the search would produce evidence of crime was in error.<sup>17</sup> Similarly, probable cause is not defeated because a substantive criminal statute is held unconstitutional.<sup>18</sup> Probable cause will be sustained so long as the magistrate reasonably determines that the search will produce contraband or evidence of crime, whether or not the underlying facts are, in actuality, accurate, and whether or not a crime has actually been committed. If, on judicial review of the magistrate's decision, it is determined under an objective assessment that probable cause was not present (as occurred in the instant case), it necessarily follows that the assessment of probable cause was objectively unreasonable, and, if any mistakes were made by the officers, they were likewise unreasonable.

Petitioner's proposal would have us take the analysis one step further. It seeks to create an exception to the exclusionary rule on the basis that the police had a "reasonable unreasonable belief" in the existence of probable cause. Such a proposal is logically unsound and practically inoperable.

If the police could reasonably have believed that probable cause was present below, the residence and vehicle searches would have been upheld. Because both the district court and the appellate court found probable cause lacking, they have determined that such belief was unreasonable. It makes no sense to now justify the searches on the basis that the police acted "reasonably unreasonably" or with a "reasonable unreasonable belief." This is particularly so since

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<sup>17</sup>See, e.g., *Franks v. Delaware*, 438 U.S. 154, 165 (1978); *Draper v. United States*, 358 U.S. 307, 310-313 (1959).

<sup>18</sup>*Michigan v. DeFillippo*, 443 U.S. 31, 37-38 (1979).

the reviewing court must not substitute its own judgment, but rather give all due deference to the magistrate's assessment of probable cause. *United States v. Ventresca*, 380 U.S. 102, 108 (1965).

Conceivably, the reasonable good-faith proposal might carry some merit where technical violations of the warrant procedure are present.<sup>19</sup> But, it should have no applicability where probable cause to search was lacking.<sup>20</sup>

### **B. In The Post-Gates Era, The Good-Faith Proposal Would Impose A "Double Dilution" Of The Probable Cause Standard In Warrant Cases**

Petitioner's good-faith proposal as it applies to warrant cases is particularly troubling in light of the Court's recent decision in *Illinois v. Gates*, 103 S.Ct. 2317 (1983). With

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<sup>19</sup>For example, federal courts are reluctant to suppress evidence for mere technical violations of the warrant procedure unless the defendant can show prejudice. See *United States v. Wyder*, 674 F.2d 224, 225-26 (4th Cir. 1982). (Although inadvertent mistake in defendants copy of warrant indicated that search had to be conducted within five hours when original had five day time limit, evidence obtain in search not suppressed because defendant not prejudiced) *cert. denied* 102 S.Ct. 44 (1982). The Ninth Circuit adopted the standard that noncompliance with Rule 41 Fed. R. Crim. Proc. requires suppression of evidence only when "(1) there was 'prejudice' in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed, or (2) there is evidence of intentional or deliberate disregard of a provision of the Rule" *United States v. Johnson*, 660 F.2d 749, 753 (9th Cir. 1981), *cert. denied* 102 S.Ct. 1263 (1982).

<sup>20</sup>The Court in *Illinois v. Gates*, 103 S.Ct. 2317, 2328 (1983) reminded that probable cause requires "only the probability, and not a prima facie showing of criminal activity." It calls for a "practical, common-sense judgment." Professor Kamisar correctly questions: Can there be a "good faith reasonable absence of practical common sense judgment"? Kamisar, Constitutional Law Symposium, *supra* note 8 at 33-34. Mertens and Wasserstrom also projected:

Conceivably, a court adopting a good faith exception would decide that because reasonableness is already built into the concept of probable cause, the exception simply does not apply in this case; the court might rule that a 'reasonable' belief that probable cause was present, when it was not, is a logical impossibility because probable cause means 'reasonable grounds for belief.'

Mertens and Wasserstrom, *The Good-Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing The Law*, 70 Geo. L.J. 365, 454 (1981).

that decision the Court has markedly facilitated the ability of police officers to obtain search warrants and significantly diminished the possibility, already rare, that the issuing magistrate's decision will be overturned on review. To now admit evidence seized pursuant to a warrant that even under *Gates* is deemed lacking in probable cause is stretching the Fourth Amendment beyond acceptable limits. Or, in Professor Kamisar's words, in the post-*Gates* era, the good-faith proposal would impose a "double dilution" of the Fourth Amendment's probable cause standard.<sup>21</sup>

Prior to *Gates*, the establishment of probable cause in the application for a search warrant was not overly burdensome. The police officer was required to show only probability, and not a *prima facie* case of criminal activity. *Spinelli v. United States*, 393 U.S. 410, 419 (1969). Such a showing could be based on hearsay, a suspect's criminal record, or other evidence not admissible at trial. See *e.g.* *United States v. Ventresca*, 380 U.S. 102, 107-09 (1965); *Jones v. United States*, 362 U.S. 257, 270 (1960); *Draper v. United States*, 358 U.S. 307, 310-13 (1959).

In *Gates*, the Court further eased the task of law enforcement to obtain and sustain a search warrant. The Court held:

The task of the issuing magistrate is simply to make a practical common sense decision whether, given all the circumstances set forth in the affidavit before him including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a *fair probability* that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a '*substantial basis* for . . . conclud[ing]' that probable cause existed. 103 S.Ct. at 2332. (emphasis added).

A "substantial basis" that a "fair probability" existed that a search would be fruitful is not a difficult test to meet.

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<sup>21</sup>Kamisar, Constitutional Law Symposium, *supra* note 8, at 34.

If there ever was a need for a reasonable good-faith exception in warrant cases there surely is none in the post-*Gates* era. *Gates*, in effect, expanded the "reasonable mistake" capability of the probable cause standard by accommodating significantly more mistakes in the warrant application. But, in the process, it has so eased the probable cause requirement, that a reasonable well-trained police officer executing a warrant lacking in probable cause cannot now act in a reasonable good-faith belief in the constitutionality of his search.<sup>22</sup> A warrant without a "substantial basis" of a "fair probability" that contraband or evidence will be found is so "clearly lacking a basing in probable cause . . ." that a "'good faith' defense to invocation of the exclusionary rule" cannot be supported.<sup>23</sup> *Illinois v Gates*, 103 S.Ct. at 2345, n. 17 (White, J., concurring).

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<sup>22</sup>Otherwise, we are left to grapple with the concept of a "reasonable good-faith" belief in a warrant that lacks a "substantial basis" for a "fair probability" that contraband or evidence of crime will be found. Kamisar, Constitutional Law Symposium, *supra*, note 8 at 35. This is yet another example of the obfuscation of bright line articulation caused by a reasonable good-faith proposal.

<sup>23</sup>Professor LaFave recently concluded:

But the essential fact of *Gates* is that it contemplates much greater deference at the suppression hearing and appellate review stages to the judgment of the officer or magistrate who made the initial probable cause decision. That being so, surely there is no need to engage in 'double counting' by first applying this less demanding test and then excusing supposedly 'good faith' deviation from it. If as *Gates* claims, probable cause is simply a 'common sense' matter, then any probable cause determination that is erroneous and thus lacking in common sense is undeserving of either the appellation 'good faith' or the sympathetic reception a 'good faith' exception would allow.

LaFave, *Supreme Court Report: Nine Key Decisions Expand Authority to Search and Seize*, 69 American Bar Association Journal 1740, 1748 (Nov. 1983).

Justice Stewart also recently wrote, with reference to a good-faith proposal, that:

if the proposal is to tolerate searches and seizures where, despite the deference given to the magistrate's determination (citation omitted), a reviewing court cannot conclude that the police officer had probable cause — even while giving the officer the benefit of the doubt where he reasonably relied on a mistaken view of the law or the facts — it approaches the 'subjective' good faith approach condemned by the Supreme Court nearly twenty years ago in *Beck v. Ohio* [379 U.S. 89, 97 (1964)].

Stewart, *supra*, 83 Colum L. Rev. at 1401.

**C. In Recent Decisions The Court Has Limited The Applicability Of The Exclusionary Rule By Restricting The Scope Of The Fourth Amendment And Narrowing The Circumstances In Which The Rule May Be Invoked**

In recent decisions, this Court has limited the applicability of the exclusionary rule in the Fourth Amendment context. This has occurred in two ways. First, the Court has restricted the types of governmental intrusions that are deemed Fourth Amendment violations; and second, the Court has narrowed the circumstances in which the exclusionary rule may be applied to exclude evidence obtained illegally. Though the impact of the Court's decisions is a weakening of the exclusionary rule, the Court has not obliterated the rule with the attendant consequences of nullifying the Fourth Amendment. Obliteration, however, is the inevitable result of petitioner's proposal, which should be rejected in light of the Court's more moderate and flexible approach.

1. *Restricting The Scope Of The Fourth Amendment.* In several recent cases, this Court has decided that certain invasions of privacy by law enforcement are not "searches" or "seizures" under the Fourth Amendment. Epitomizing this recent trend of the Court is Justice Rehnquist's pronouncement in *United States v. Knotts*, 103 S.Ct. 1081, 1086 (1983), that "[n]othing in the Fourth Amendment prohibited the police from augmenting the sensory facilities bestowed upon them at birth with such enhancement as science and technology afforded them in this case." In *Knotts*, the Court held that the police monitoring of a suspect for a considerable distance by means of a "beeper" (an electronic tracking device) until his car stopped at a cabin in a secluded area was neither a "search" nor a "seizure" under the Fourth Amendment. The majority took the position that such scientific enhancement could not be

distinguished constitutionally from visual surveillance.<sup>24</sup>

The Court's restrictive interpretation of the right to privacy in *Knotts* was echoed in other recent decisions. For example, in *Smith v. Maryland*, 442 U.S. 736 (1979), the Court held that the use of a pen register to record numbers dialed from a suspect's home is not a "search" within the meaning of the Fourth Amendment. Although a list of numbers dialed from a private phone can reveal intimacies of personal life, the Court explained that telephone subscribers do not "harbor any general expectation that the numbers they dial will remain secret" (*id.* at 743). Similarly, in *United States v. Miller*, 425 U.S. 435 (1976), the Court held that a bank depositor has no "legitimate expectation of privacy" as to checks and deposit slips voluntarily proffered to the bank. The Court explained that such documents can be subjected to government subpoena because, as with phone calls dialed on a private telephone and revealed by the phone company to the government, the depositor runs the "risk" that the bank will present his records to the government. In the Court's view, both the bank depositor and the telephone subscriber surrender their privacy interests.

In addition, in other recent decisions, the Court has approved warrantless police searches based on less than probable cause in the automobile context. For example, in *Michigan v. Long*, 103 S.Ct. 3469 (1983), the Court, extending its holding in *Terry v. Ohio*, 392 U.S. 1 (1968) to a vehicle search, held that a weapon search could extend to the passenger compartment of a car not occupied by the suspect absent probable cause to arrest him. Furthermore, in *New York v. Belton*, 453 U.S. 454 (1981), the Court further eased the burden of police to obtain a warrant for the search of containers seized from stopped vehicles. The Court held

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<sup>24</sup>However, as recognized by the concurrence, the majority position was a marked departure from the Court's decision in *Katz v. United States*, 389 U.S. 347 (1967). *Knotts*, 103 S.Ct. at 1089 (Stevens, J., concurring). See, LaFave, *supra*, 69 American Bar Association Journal at 1740 ("the Court often has taken an exceedingly narrow view of *Katz*").

that as long as the police have probable cause to arrest the car's occupants, the police may conduct a warrantless search of the car's interior, including closed containers, even though the occupants are handcuffed and surrounded by the police outside the car, and even if the officer lacks probable cause to believe the car contains evidence of crime. Also in *United States v. Ross*, 456 U.S. 798 (1982), the Court, in effect reversing its recent decision in *Robbins v. California*, 453 U.S. 420 (1981), extended the "automobile exception" to the warrant requirement. It held that the police may conduct a warrantless search of a closed container found in a locked car trunk if they had probable cause to believe the car contained evidence of crime.<sup>25</sup>

2. *Narrowing The Circumstances Where The Exclusionary Rule May Be Applied.* Although recognizing a violation of constitutional rights, the Court has restricted use of the exclusionary rule in certain proceedings or for certain purposes and to certain individuals. Although none

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<sup>25</sup>In other circumstances the Court has reaffirmed the Fourth Amendment requirement that no search or seizure be made without a warrant based on probable cause. See, e.g. *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (privacy interference and Fourth Amendment violation to stop car without articulable and reasonable suspicion); *Dunaway v. New York*, 442 U.S. 200, 216 (1979) (detention for custodial interrogation violates interests protected by the Fourth Amendment); *Payton v. New York*, 445 U.S. 573, 601 (1980) (warrantless entries into homes violates "overriding respect for the sanctity of the home"); *United States v. Chadwick*, 433 U.S. 1 (1977) (sufficient privacy interests in personal effects, placed inside double-locked footlocker to entitle Fourth Amendment protection).

Under our present system, the Court is afforded needed flexibility in deciding whether a Fourth Amendment violation has occurred. In those situations where the Court has opted to limit the privacy right, it has, therefore, foreclosed applicability of the exclusionary rule. On the other hand, where the Court has found a Fourth Amendment violation, it has employed the exclusionary rule to enforce its ruling. However, under a good-faith process, the Court's decisions in such cases as *Prouse*, *Dunaway*, *Payton*, and *Chadwick* among others, may never have occurred, as police could act under a reasonable mistake where such actions were not foreseeably Fourth Amendment violations (See pages 17-18, n. 7, *supra*). It appears that the Court's method of controlling applicability of the exclusionary rule is exceedingly more appropriate than the inflexible solution tendered by petitioner.

of these restrictions apply directly to proof of an accused's guilt in the trial setting, they, nevertheless, impact indirectly to weaken the rule. This has, in turn, had the unfortunate result of providing more incentive for police to violate the Fourth Amendment.

For example, the exclusionary rule may no longer be applied in certain proceedings collateral to the actual criminal trial. Unlawfully-seized evidence is not admissible in grand jury proceedings,<sup>26</sup> and in civil proceedings to collect federal wagering taxes when the illegal search was conducted by state officials.<sup>27</sup> Also, a state prisoner may not be granted federal habeas corpus relief on search and seizure grounds unless he has been denied "an opportunity for full and fair litigation" of the claim in the state courts.<sup>28</sup> Moreover, in the criminal trial itself, the exclusionary rule may not be used to bar the introduction of illegally-seized evi-

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<sup>26</sup>*United States v. Calandra*, 414 U.S. 338, 349 (1974). Professor LaFave has argued that the Court's decision in *Calandra* has distinguished *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391-92 (1920) (grand jury may not subpoena documents when knowledge of their existence and contents derived from illegal search) "out of existence." I W. LaFave, *Search and Seizure: a Treatise on the Fourth Amendment*, §1.4 at 64 (1978).

<sup>27</sup>*United States v. Janis*, 428 U.S. 433, 454 (1976). In this case, the majority emphasized that any deterrent effect in excluding evidence seized by the state police for use in a federal proceeding was "highly attenuated" (*id.* at 458). Justice Stewart pointed out in dissent, however, that deterrence was pronounced since the federal and state officials had a relationship of "mutual cooperation and coordination" (*id.* at 462). In couching Justice Stewart's point somewhat differently, Professor Kamisar explained, "by ruling that evidence obtained unconstitutionally by local police is admissible in a federal civil proceeding in *Janis*-type circumstances, the Court failed to eliminate a significant incentive to violate the Fourth Amendment when local and federal authorities are working closely together." Kamisar, *Constitutional Law Symposium*, *supra* note 8 at 43. Indeed, state and federal officials can combine efforts in criminal cases as the combination of state police, state judge authorizing a search warrant and federal prosecutors pursuing a federal indictment in the instant case.

<sup>28</sup>*Stone v. Powell*, 428 U.S. 465, 493-94 (1976). "*Stone v. Powell* all but explicitly overruled *Kaufman v. United States*, 394 U.S. 217, 228 (1969) (vindication of prisoner's constitutional rights outweighs value of finality in criminal judgments)." Mertens and Wasserstrom, *supra*, 70 Geo. L.J. at 388, n. 109.

dence to impeach the defendant's testimony.<sup>29</sup> Finally, a new Fourth Amendment decision will have no retroactive application even to cases pending direct review at the time of the decision.<sup>30</sup>

Not only has the Court limited application of the exclusionary rule in certain proceedings and for certain purposes, it has restricted its use to certain defendants in a criminal proceeding. In *Alderman v. United States*, 394 U.S. 165 (1969), the Court, rejecting the defendants' request to eliminate the standing requirement, held that a motion to suppress unconstitutionally-seized evidence can be "successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence" (*id.* at 171-72). The defendants had argued that the standing doctrine was inconsistent with the deterrence rationale of the exclusionary rule and encouraged police to violate the rights of third parties to obtain evidence on targets. The danger envisioned

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<sup>29</sup>*United States v. Havens*, 446 U.S. 620, 627-28 (1980). *Havens*, in effect, permits the use of illegally-seized evidence for impeachment virtually every time a defendant testifies. This encourages police to conduct unconstitutional searches, if for no other reason, to store up evidence to be used for impeachment, even though not admissible in the prosecution's case-in-chief. The Court's decision in *Havens* is similar to its earlier decision in *Harris v. New York*, 401 U.S. 222, 225-26 (1971) where the Court held that although the defendant's prior inconsistent statements were inadmissible in the prosecution's case-in-chief under *Miranda v. Arizona* (1966) 384 U.S. 436, such statements could be used for impeachment. The problems created by *Harris* pertaining to deterrence apply also to *Havens*. See Dershowitz and Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 Yale L.J. 1198 (1971).

Also, with reference to the criminal trial itself, the Court may have recognized the "doctrine of inevitable discovery." In *Brewer v. Williams*, 430 U.S. 387, 406, n. 12 (1977), the Court suggested that illegally-seized evidence may be admissible at trial on the ground that its discovery was inevitable absent police misconduct. Professor Saltzburg has cautioned that the "doctrine of inevitable discovery presents perhaps the greatest potential for creating incentives for unconstitutional police conduct." Saltzburg, *Foreword: The Flow and Ebb of the Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 Geo. L.J. 151, 195 (1980).

<sup>30</sup>*United States v. Peltier*, 422 U.S. 531, 538-39 (1975).

by the standing opponents was borne out in *United States v. Payner*, 447 U.S. 727 (1980). In that case, the trial court found that the government "affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties." 447 U.S. at 730. Although under such circumstances, the application of the exclusionary rule would have had a deterrent effect on government misconduct, the Court, nevertheless, held that a federal court could not exercise its supervisory powers to exclude the evidence. Since *Alderman*, the Court has solidified the standing doctrine as a means of depriving defendants of the availability of the exclusionary rule.<sup>31</sup>

In each of these circumstances, collateral to proof of guilt at trial, the Court has deemed application of the exclusionary rule inappropriate as the loss of deterrence seemed marginal. Yet, the cumulative effect of these decisions on the deterrence of unconstitutional police conduct is significant. As the police are aware of an increasing number of approved uses of evidence seized illegally, they are more willing to risk violating the Fourth Amendment. "If, for example, the police unlawfully stop and search a car and its occupants, it is likely that some of the passengers would not have

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<sup>31</sup>See *Rakas v. Illinois*, 439 U.S. 128 (1978) (car passengers lack "standing" to contest the legality of car search); *United States v. Salvucci*, 448 U.S. 83 (1980) (overruling automatic standing doctrine of *Jones v. United States*, 362 U.S. 257 (1960) when defendants charged with crimes of possession); *Rawlings v. Kentucky*, 448 U.S. 98 (1980) (apparently rejected well-settled principle that a possessory interest in the seized items suffices to establish standing).

Indeed, in the instant case, the district court found that certain defendants lacked standing to raise Fourth Amendment objections to various searches (J.A. 127-29). For example, the court held that respondent Del Castillo had no standing to object to any of the residence searches or vehicle searches other than the search of his own vehicle. Yet, as argued to the trial court to persuade it to apply California standing rules, under California's vicarious standing doctrine, the respondents would have been afforded the right to object to all illegally-seized evidence to be used against them at trial. See *People v. Gale*, 9 Cal.3d 788, 793 (1973).

standing to challenge admission of unlawfully seized evidence, or that the evidence will be admitted either to impeach the testimony of a defendant, or to secure an indictment in a grand jury proceeding. Although police may not be thinking about any particular one of these permissible collateral uses of unlawfully-seized evidence, they may well go ahead with the unlawful search, confident that in one way or another it is likely to pay off." Mertens and Wasserstrom, *supra*, 70 Geo. L.J. at 388. Indeed, the "existence of a broad class of exceptional cases serves to create significant disincentives for law enforcement obedience to strict fourth amendment constraints." Burkoff, *The Court that Devoured The Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 Ore. L. Rev. 151, 153 (1979).

We are fast approaching the point where so many incentives for obtaining evidence illegally are available that the exclusionary rule can no longer meaningfully deter police misconduct. Each time the Court deems that the "costs" of the rule outweigh its "benefits" in collateral proceedings, it diminishes the continued benefits of the rule in the trial setting itself. Each time the exclusionary rule is not available to exclude use of illegally-seized evidence, it encourages officers to violate the Fourth Amendment and take a chance that the fruits of their misconduct will be used in some fashion by the prosecuting authorities.

Although the good faith proposal may have had some validity in years past,<sup>32</sup> its time has come and gone. The

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<sup>32</sup>Professor Kamisar recently observed:

There might have been a need for a good faith test right after *Mapp* or just before the "stop and frisk" cases — or before the Court loosened the concept of "consent" — or before it adopted "bright line tests" . . . favoring the police (especially automobile search cases), or before it diluted the standard of probable cause in *Gates*, or before it took such a crabbed view of what constitutes a "search" in the "pen register" and "beeper cases" — or before it began narrowing the thrust of the exclusionary rule in the 1970s. But I submit that in the year 1983 the protections afforded by the Fourth Amendment have been so weakened and the exclusionary rule itself so bruised and battered that *the last thing* we ought to do is take another bite out of it by adopting a "good faith" or a "good faith, reasonable belief" exception.

Kamisar, *Constitutional Law Symposium*, *supra* note 8 at 45-46.

proposal is both unnecessary and cost-ineffective, as the deterrent benefits of the exclusionary rule are worth preserving, though diminishing in strength.

**D. The Practical Application Of A Good-Faith Test Would Promote Police Ignorance And Impose An Administrative Burden On Suppression Judges**

Petitioner contends that the exclusionary rule's deterrent purpose would not be served by excluding evidence seized by a police officer acting with a reasonable, but mistaken, belief that his conduct complied with the Fourth Amendment. Precisely what constitutes a "reasonable belief" and how such a standard would be litigated in suppression hearings raises serious conceptual and practical problems.

Conceptually, the reasonable mistake proposal ignores the "systemic deterrence" provided by the exclusionary rule (see pages 50-56, *infra*) and narrowly focuses on only the police officer in question. Because the reasonableness of that officer's actions would be determinative, the more ignorant the officer is of the applicable law, the more likely would his unconstitutional acts be deemed reasonable. As a former prosecutor has noted, a reasonable good-faith exception to the exclusionary rule would "put [ ] a premium on 'police ignorance.'" Sachs, *The Exclusionary Rule: A Prosecutor's Defense*, 1 Crim. Just. Ethics, 28, 32 (1982); Kaplan, *The Limits of the Exclusionary Rule*, 26 Stan. L. Rev. 1027, 1044 (1974) (police department dedicated to crime control would have incentive to leave its officers uneducated about law so that constitutional violations could be labeled inadvertent).

Apparently recognizing this problem, petitioner has proposed adoption of an "objective reasonableness" standard (Pet. Br. 78-79). That is, rather than focusing on the subjective intent of the particular officer, the court would determine whether the officer's actions were objectively reasonable under the circumstances. Unfortunately, the proposal would not only fail to cure the problem, it would create an

intolerable administrative burden on suppression judges.

Focusing the inquiry on the objective reasonableness of the officer's actions would not eliminate the subjective component of the analysis. The officer would inevitably be asked to explain why he acted unconstitutionally in order for the court to determine if such was reasonable.<sup>33</sup> Inquiry would also be made of the "subjective states of mind of numerous people," *United States v. Peltier*, 422 U.S. at 560 (Brennan, J., dissenting), many of them law enforcement officials, in order to determine what a well-trained officer would be expected to do under the circumstances. Despite contrary intentions, the objective reasonableness test would promote "systemic ignorance" on the part of police departments, for it would be their training and experience that would determine reasonableness and the more ignorant police in general are of the law, the more reasonable would be the unconstitutional acts of their fellow officers.

The application of the objective reasonableness test would exert extreme administrative burdens on suppression judges. The defendant would seek to prove that the executing officer acted in bad faith, by showing that the officer had adequate training to know that his actions were unlawful, or that he acted unreasonably, by demonstrating the inadequacy of the officer's training in light of what would be expected of the well-trained police officer.<sup>34</sup> To accomplish this objective,

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<sup>33</sup>A subjective inquiry would seem necessary, if inducing police to comply with the Fourth Amendment is the goal. In warrant cases, the degree to which the particular officer applying for the warrant employed judge-shopping would bear on his good-faith intentions. For example, if Officer Rombach's warrant application had been rejected by five judges before finally signed by Judge Murphy, would not the ensuing search be objectively unreasonable? Or, if Officer Rombach had employed forum-shopping to avoid application of California's vicarious standing doctrine to the state search in question, would not this demonstrate his bad-faith attempt to manipulate the warrant process? Unfortunately, since good faith was not litigated below, such inquiries were not made of Officer Rombach.

<sup>34</sup>Exactly what is to be expected of a well-trained officer is a difficult determination. Should the suppression judge use a national standard or local one? Should the judge consider that police departments serving a lightly-populated area lack budgets to train their officers as well as a department of a major city with a larger tax base and more funds for police education?

the defendant would likely call as witnesses the police brass in charge of training and continuing education,<sup>35</sup> and other participants in the criminal justice process, such as law professors and criminal law practitioners.<sup>36</sup> With the calling of such witnesses, "suppression hearings, which opponents of the exclusionary rule criticize for consuming precious court time, will seem positively fleeting by comparison to

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<sup>35</sup>Moreover, the insertion of testimony from police officers as an additional component in suppression hearings would present further problems. As this Court recognized, "sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources." *Massachusetts v. Painten*, 389 U.S. 560, 565 (1968) (White, J., dissenting). Not only would such an exercise prove unduly burdensome for the courts, it would introduce into the suppression hearing a factual issue on which evidence will be "difficult to come by apart from the officer's self-serving and generally uncontradicted testimony." Kaplan, *The Limits of the Exclusionary Rule*, 26 Stan. L. Rev. 1027, 1045 (1974); see LaFave, *The Fourth Amendment In An Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. Pitt. L. Rev. 307, 356 (1982); Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. Crim. L. & Crim. 635, 655 (1978) (the court is unlikely to have anything before it other than the officer's assurance that he was convinced he had probable cause and that this "testimony, whether truthful or perjured, is almost impossible to refute.")

In view of the fact that trial judges are adverse to suppressing probative evidence, they will inevitably cling to objective reasonableness as a means of avoiding suppression. And even judges sensitive to Fourth Amendment issues, when faced with a reasonableness test, would defer to the police and rule on the side of reasonableness. Mertens and Wasserstrom, *supra*, 70 Geo. L.J. at 449 ("We can expect, then, to find, judge's thumbs on the reasonableness side of any sliding scale"); Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 394 (1974) (With a reasonableness test, in practice, "appellate courts defer to trial courts and trial courts defer to the police").

<sup>36</sup>No such good faith hearing occurred in the trial court in the instant case. The suppression hearing below pertained only to the probable cause determination and whether the officers complied with the California "knock notice" provision when executing the warrant. The issue of good faith was raised by the government as an after-thought in argument after the court had found the warrant defective. In fact, the trial court denied the respondents an opportunity to inquire about the informant referred to in the warrant application — an inquiry, undoubtedly pertinent to the issue of good faith to determine whether the officer acted reasonably in seeking a warrant based on the informant. Without such a hearing below, respondents submit, there is no basis to conclude the officers' actions were taken in good faith.

those born of the good faith exception." Mertens and Wasserstrom, *supra* 70 Geo. L.J. at 448.

Apparently recognizing the need for judicial review of some probable cause determinations, petitioner acknowledges that suppression may be justified in cases where the magistrate's ruling was egregious or the police acted in bad faith in applying for the warrant (Pet. Br. 65). Under such a formulation, an additional issue in suppression hearings will become, not whether, but the degree to which the magistrate's belief in the reasonableness of the search was unreasonable — was it moderately unreasonable or egregiously unreasonable? Suppression judges will be asked to engage in a cumbersome and time-consuming determination of what a reasonably competent magistrate would have decided or the extent to which probable cause was lacking in the warrant application. Moreover, the new inquiry would serve to modify the probable cause standard. Instead of prohibiting unreasonable searches as defined by probable cause, courts would be permitted to sustain unreasonable searches as long as they were not egregiously unreasonable. This dilution of probable cause would have the drastic effect of rewriting the Fourth Amendment.

#### **E. Modification Of The Exclusionary Rule Should Be A Legislative, Not Judicial, Undertaking**

The task of modifying the exclusionary rule, if such an objective be sought, is more appropriately delegated to the legislature. Proposed modifications of the exclusionary rule have already been the topic of congressional debate.<sup>37</sup> In-

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<sup>37</sup> Legislation was introduced in both the 97th and 98th Congresses which would eliminate entirely the exclusionary rule in federal criminal proceedings and substitute a right of action directly against the federal government under the Federal Tort Claims Act. S. 283, 98th Cong., 1st Sess. (1983); S. 751, 97th Cong., 1st Sess. (1981). Furthermore, during the last session of Congress, the Subcommittee on Criminal Law of the Senate Committee on the Judiciary held hearings on legislation creating a good-faith exception, (The Exclusionary Rule Bills 1981-1982; Hearings on S. 101, S. 751 and S. 1995, 97th Cong., 1st and 2nd Sess.) (hereinafter referred to as "Hearings") and similar bills were introduced in the 98th Congress. See H.R. 2239, 98th Cong., 1st Sess (1983); S. 101, 98th Cong., 1st Sess. (1983). Indeed the hearing procedure permitted by congressional debate is necessary to have a full airing of views.

deed congressional debate, not appellate argument before this Court, seems the most efficacious way to conduct full review of the exclusionary rule. First, all proposed modifications of the rule can be discussed, not simply the one proposed here by petitioner. Moreover, empirical studies relied upon by petitioner can be analyzed more meaningfully by hearing live testimony from social scientists rather than having this Court delve into written studies reaching conflicting results. In addition, congressional modification of the rule would serve an important policy function. In opposing outright judicial elimination of the rule, Chief Justice Burger articulated:

Obviously, the public interest would be poorly served if law enforcement officials were suddenly to gain the impression however erroneous, that all constitutional restraints on police had somehow been removed — that an open season on ‘criminals’ had been declared. I am concerned lest some such mistaken impression might be fostered by a flat overruling of the suppression doctrine cases.

Reasonable and effective substitutes can be formulated if Congress would take the lead, as it did for example in 1946 in the Federal Tort Claims Act. I see no insuperable obstacle to the elimination of the suppression doctrine if Congress would provide some meaningful and effective remedy against unlawful conduct by government officials.

*Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 421 (1971) (Burger, C.J., dissenting).

In sum, Congress should be permitted to continue the exclusionary rule debate and formulate new legislation on the issue.<sup>38</sup> Then, if necessary, this Court may be asked to rule on the constitutionality of the provision. But in that

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<sup>38</sup>*Wolf v. Colorado*, 338 U.S. 25, 40 (Black, J., concurring) (the exclusionary rule “is a judicially created rule of evidence which Congress might negate”) (emphasis added).

eventuality the issue for the Court will be much narrower and confine itself to a particular statute. In contrast, the issue now before the Court requires it to, in effect, write the statute itself — an undertaking more appropriately left to the Congressional pen.

#### **IV. A COST-BENEFIT ANALYSIS OF THE EXCLUSIONARY RULE SHOWS MORE BENEFIT THAN COST**

##### **A. The Exclusionary Rule Not Only Deters Police Misconduct, It Furthers Compliance With The Fourth Amendment By Creating “Systemic Deterrence”**

Petitioner has assigned the burden of proving empirically the deterrent effect of the exclusionary rule on those who support the rule's continuation. This Court recognized more than twenty years ago the unavailability of empirical data to prove deterrence, explaining:

[e]mpirical studies are not available to show that the inhabitants of states which follow the exclusionary rule suffer less from lawless searches and seizures than do those of states which admit evidence unlawfully obtained. *Since as a practical matter it is never easy to prove a negative, it is hardly likely that conclusive factual data could ever be assembled.* (emphasis added)

*Elkins v. United States*, 364 U.S. 206, 218 (1960). More recently, the Court noted the virtual impossibility of the empirical task. In *United States v. Janis*, 428 U.S. 433, 450-51 (1976), it explained:

[a]lthough scholars have attempted to determine whether the exclusionary rule in fact does have any deterrent effect, each empirical study on the subject, in its own way, appears to be flawed. It would not be appropriate to fault those who have attempted empirical studies for

their lack of convincing data.<sup>39</sup>

“Obviously the assignment of the burden of proof on an issue where evidence does not exist and cannot be obtained is outcome determinative.” Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 Ind. L.J. 329, 332-33 (1973). As Professor Canon concluded, the assignment of the burden to prove the deterrence capability of the exclusionary rule “is little more than the adoption of an old ‘debaters trick’ where when nothing can be proven either way, the first debater vigorously asserts that it is incumbent upon the second debater to prove his arguments.” Canon, *Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument For Its Retention*, 23 S. Tex. L.J. 559, 564 (1982).<sup>40</sup>

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<sup>39</sup>The Court in *Janis* explained that the collection of empirical data is prevented by several factors: the number of variables is substantial and many cannot be measured or effectively controlled; recordkeeping before *Mapp* was spotty, and controlled-studies after *Mapp* not possible; response studies are hampered by respondent's interests; and, finally, extrapolation studies are inconclusive due to changing circumstances. 428 U.S. at 452-53. Moreover, even the study by Professor Oaks, (Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970)), cited by petitioner as the “leading empirical study on the question” (Pet. Br. 41) ultimately determined that no conclusive results could yet be formulated from existing data about the rule's deterrent effect.

<sup>40</sup>In addition, as Professor Goodpaster noted, Criticism of the exclusionary rule for failure to deter is misleading; it assumes we should adopt only those rules that are demonstrably effective. In this it neglects analogous applications of criminal law. For example, it is unknown whether the death penalty deters the commission of crimes [see, *Gregg v. Georgia*, 428 U.S. 153, 185 (plurality opinion) (“no convincing empirical evidence either supporting or refuting [deterrence]”), yet there is a death penalty. Similarly, it is unknown whether, or to what degree, the prosecutions and punishments of the criminal code deter, yet they are not eliminated because it has not been proven that they deter.” Goodpaster, *An Essay on Ending the Exclusionary Rule*, 33 Hast. L.J. 1065, 1084 (1982). See Canon, *supra*, 23 S. Tex. L.J. at 564-65 (“Social science research is simply not advanced enough to come to very precise conclusions about the impact of most public policies — not just the exclusionary rule”).

Despite the unavailability of empirical data, experience with the exclusionary rule demonstrates that it does have a deterrent effect on police conduct. The dramatic increase in the use of search warrants in the post-*Mapp* years indicates that the Court's decision impacted on police practices. See Melner, *Supreme Court Effectiveness and the Police Organization*, 36 L. & Contem. Prob. 467, 475 (1971). Furthermore, the rule has caused police departments to increase training of their officers to effectuate compliance with the Court's Fourth Amendment decisions. See Edwards, *Law Enforcement Training in the United States*, 3 Am. Crim. L.Q. 89, 90 (1965) (FBI held over 600 training schools for state and local police officers between date of *Mapp* decision in 1961 and 1965). Moreover, the rule has also encouraged working relationships between police and prosecutors to ensure that evidence is obtained in ways not resulting in its suppression. See Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories"*, 53 J. Crim. L., Crim. & P.S. 171, 179-82 (1962). Indeed, in recent testimony, the Attorney General of Maryland, a former United States Attorney, stated in reference to modification of the exclusionary rule, that "[e]xclusion from evidence is almost certainly in my judgment the only deterrent in the vast majority of unconstitutional intrusions." Hearings, *supra* note 37 at 19 (Statement of Stephen H. Sachs). Finally, Justice Potter Stewart, after recognizing the aforementioned impact of the rule, concluded "[t]hat fourth amendment violations nevertheless occur does not suggest that the exclusionary rule is ineffective; instead it suggests that continued vigilance by the courts is necessary to ensure that the rule . . . [is] faithfully applied." Stewart, *supra* 83 Colum L. Rev. at 1396.

After accepting as "intuitively plausible" (Pet. Br. 41) that suppression of evidence can deter police misconduct, petitioner calls for a "focused exception" (Pet. Br. 45) to the exclusionary rule. It argues that "[t]here is no basis for faulting an officer who has made a reasonable but incorrect assessment regarding the existence of . . . probable cause

or the necessity of obtaining a warrant," (Pet. Br. 51) and, therefore, in such cases, suppression would not achieve deterrence. If this type of "specific deterrence" (that focusing on the individual officer) was the only, even the most significant, type of deterrence created by the exclusionary rule, petitioner's argument may have some merit. However, the effects of the exclusionary rule are systemic and are linked directly to the widespread enforcement of the Fourth Amendment itself.

A fundamental shortcoming of the good-faith proposal is that it shortchanges the effect of the exclusionary rule on furthering Fourth Amendment compliance. It is true, as petitioner contends, that an individual officer acting in reasonable good faith should not be faulted for his unconstitutional conduct. But the concern for deterrence of unconstitutional conduct does not stop with that officer. The deterrence accomplished by the exclusionary rule is one of "systemic deterrence" — deterrence of all law enforcement officers, of magistrates and of prosecutors from pursuing actions violative of the Fourth Amendment. The exclusionary rule serves to implement and develop the teaching of the Fourth Amendment throughout the criminal justice system.<sup>41</sup>

The concept of systemic deterrence is rooted in the justifications given by this Court for the exclusionary rule

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<sup>41</sup>See Mertens and Wasserstrom, *supra* 70 Geo. L.J at 394-405; Justice Stewart concurs that "the rule is designed to produce a 'systematic' deterrence." "Stewart, *supra*, 83 Colum. L. Rev. at 1400. The concept was adopted and articulated by another commentator in criticizing the reasonable good-faith belief standard:

Thus far we have considered the reasonable good-faith belief standard as if the only party subject to deterrence were the offending officer. This is, of course, too simplistic a view. Other officers, superiors and law enforcement institutions themselves are targeted by the exclusionary rule. Thus, to the extent that the rule affords an impetus toward litigating the contours of the Fourth Amendment and serves as the occasion for a court pronouncement on the same application of the rule may be said to deter violations. Schlag, *Assaults on the Exclusionary Rule: Good Faith Limitations and Damage Remedies*, 73 J. Crim. L. and Criminology 875, 898 (1982).

through the years. In *Elkins v. United States*, 364 U.S. 206, 223 (1960), the Court emphasized "the imperative of judicial integrity" (emphasis added), explaining that the courts should not become "accomplices in the wilful disobedience of a Constitution they are sworn to uphold." This concern that the judicial process not countenance unconstitutional conduct was further articulated in *Terry v. Ohio*, 392 U.S. 1, 13 (1968) where the Court explained:

Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.

Moreover, the Court has also justified the rule in terms of preventing those who *execute* the laws from benefiting from unlawful conduct. A purpose of the exclusionary rule is that "of assuring the people — all potential victims of unlawful government conduct — that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government." *United States v. Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting). This sentiment was expressed in *Weeks* where the Court declared:

The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts . . .

To sanction such proceeding would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibition of the Constitution, intended for the protection of the people against such unauthorized action.

*Weeks*, 232 U.S. 383, 392. See *Mapp v. Ohio*, 367 U.S. 643, 657 (1961) ("no man is to be convicted on unconstitutional evidence.").

In recent decisions, the Court has combined these justifications for the exclusionary rule into its concept of deterrence. It explained in *United States v. Janis*, 428 U.S. 433 (1976):

The primary meaning of 'judicial integrity' in the context of evidentiary rules is that the court must not commit or encourage violations of the constitution. In the Fourth Amendment area, however, the evidence is unquestionably accurate, and the violation is complete by the time the evidence is presented to the court. The focus therefore must be on the question whether the admission of the evidence encourages violation of Fourth Amendment rights. As the Court has noted in recent cases, this inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose (*id.* at 458-59, n. 35) (citations omitted).

Thus, the Court is not merely concerned with the deterrence of the individual officer making the search or seizure; it is concerned with systemic deterrence of violations of Fourth Amendment rights to preserve the integrity of the courts and maintain popular trust in government.<sup>42</sup>

In warrant cases, the exclusionary rule promotes compliance with the probable cause requirement of the Fourth Amendment and is the mainspring of an effective warrant issuance system. For example, the magistrate scrutinizes

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<sup>42</sup>An example of systemic deterrence is the response to the Court's decision in *Delaware v. Prouse*, 440 U.S. 648 (1979). In *Prouse* the Court ruled that the police may not stop a car on the open road for a license or registration check, in the absence of articulable suspicion to believe in the presence of criminal activity. The institutional response to the decision was significant, as law enforcement agencies modified their practices to avoid suppression of valuable evidence. In dramatic fashion, the exclusionary rule "prevents countless abridgements of fourth amendment rights through law enforcement's institutional response to changes in fourth amendment law". Mertens and Wasserstrom, *supra*, 70 Geo. L.J. at 400-401.

the warrant application, not simply because of his professional responsibility to reach a "correct decision," (Pet. Br. 60) but because his decision concerning probable cause may be reviewed on a suppression motion. Further, the magistrate knows what is "correct" because of the existence of appellate court decisions made possible by an exclusionary rule. Similarly, precisely because police are determined to have their searches survive a suppression motion, and because they know that the magistrate's decision will be subject to judicial review, they take care to obtain probable cause before conducting a search. When, as in the instant case, evidence is suppressed due to lack of probable cause, all magistrates and police who come to learn of the decision will modify their acts accordingly in future cases. Magistrates will be more fully informed as to what constitutes probable cause, and the police will seek to obtain more evidence of crime before applying for the warrant. The end result is systemic deterrence of Fourth Amendment violations "by removing the incentive to disregard [the Amendment]". *Stone v. Powell*, 428 U.S. 465, 492 (1976).

### **B. The Exclusionary Rule Is The Only Effective Means To Ensure Fourth Amendment Compliance**

The exclusionary rule gives teeth to the Fourth Amendment. To acknowledge that the Constitution forbids search warrants to issue on less than probable cause, but then to permit admission of evidence obtained in violation of the constitutional prohibition is effectively to protect "the right of the people to be secure" only procedurally, not substantively. See *Aguilar v. Texas*, 378 U.S. 108 (1964); *Nathanson v. United States*, 290 U.S. 41 (1933). A constitutional rule without an enforcement mechanism amounts to empty rhetoric.

The lesson gleaned from the experience in states without the exclusionary rule in the years between *Wolf* (338 U.S. 25 (1949)) and *Mapp* (367 U.S. 643 (1961)) is instructive. The California Supreme Court concluded that it was com-

pelled to adopt the exclusionary rule "because other remedies have completely failed to secure compliance with the constitutional provisions. . . ." *People v. Cahan*, 44 Cal.2d 434, 445 (1955). This Court further noted in *Mapp* that the "experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States. The obvious futility of relegating the fourth amendment to the protection of other remedies has, moreover, been recognized by this Court since *Wolf*." *Mapp*, 367 U.S. at 652-53. See generally Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 Duke L.J. 319, 323-24 (in states without an exclusionary rule egregious and premeditated official misconduct persisted, and neither the "internal discipline" of the police nor "the eyes of an alert public opinion" protected the citizenry). Finally, law enforcement authorities throughout the nation reacted to *Mapp* as if the Court had just created the Fourth Amendment, rather than merely decided to enforce laws always applicable to the states.<sup>43</sup>

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<sup>43</sup>Police Commissioner Michael Murphy of New York observed:

I can think of no decisions in recent times in the field of law enforcement which had such a dramatic and traumatic effect as this . . . I was immediately caught up in the entire program of reevaluating our procedures which had followed the *DeFore* rule, and modifying, amending, and creating new policies and new instructions for the implementation of *Mapp* . . . Retraining sessions had to be held from the very top administrators down to each of the thousands of foot patrolmen.

Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More Than "An Empty Blessing"*, 62 *Judicature* 337, 347 (1979) (quoting Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments*, 44 *Tex. L. Rev.* 939, 941 (1966)). Similarly, referring to the adoption of the exclusionary rule by the California Supreme Court, Los Angeles Chief of Police William Parker warned that the rule prohibited his officers from taking "affirmative action" in law enforcement unless and until they possessed "sufficient information to constitute probable cause." Kamisar, *Is the Exclusionary Rule An "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?* 62 *Judicature* 67, 72 (1979) (quoting W. Parker, *Police* 117, 131 (1957)). See also, *id.*, 62 *Judicature* at 70-72 (similar experience in Minnesota). Finally, with reference to search warrants, New York Deputy Police Commissioner Reisman commented:

(footnote continued on following page)

Although there are other remedies currently available for Fourth Amendment violations, only the exclusionary rule promotes police compliance with the constitutional mandate. One such remedy is criminal prosecution pursuant to 18 U.S.C. §242 (1976) for deprivation of constitutional rights. However, under *Screws v. United States*, 325 U.S. 91 (1945), only "wilful" deprivations can form the basis of prosecution. Because of the difficult burden of proof and harshness of the sanction, criminal prosecutions are rare. Another infrequently used remedy is a federal action seeking an injunction against Fourth Amendment violations by a law enforcement agency. Here, the moving party must overcome the heavy burden of proving the agency's "policy" of unconstitutional behavior (*Rizzo v. Goode*, 432 U.S. 362 (1976)), and the likelihood that such policy will inflict similar future injury (*City of Los Angeles v. Lyons*, 103 S.Ct. 1660 (1983)).

Although an action for damages against federal officials under the Fourth Amendment is available (*Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971)), it is not sufficient to enforce compliance with the Amendment. First, it is difficult to obtain a judgment against a police officer because he is immune from liability for actions reasonably taken in good faith (see, *Harlow v. Fitzgerald*, 102 S.Ct. 2727, 2738 (1982)) and juries are inclined to believe the testimony of law enforcement officials. Judgments against the governmental body are even more rare since liability occurs only when its "policies" give rise to the constitutional violation. *Monell v. Dep't. Soc. Services*, 436 U.S. 658 (1978). Furthermore, in

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The Mapp case was a shock to us. . . . Before this nobody bothered to take out search warrants. Although the U.S. Constitution requires warrants in most cases, the U.S. Supreme Court had ruled [until 1961] that evidence obtained without a warrant — illegally if you will — was admissible in state courts. So the feeling was, why bother?

Kamisar, *supra*, 62 Judicature 337 at 349-50 (quoting N.Y. Times, April 28, 1965, p. 50).

cases as the instant one, where the magistrate errs on the probable cause determination, the magistrate is immune from a damage suit. *Stump v. Sparkman*, 435 U.S. 349, 362, n. 12 (1978). Damage actions do have the benefit of compensating victims of constitutional violations, but they are time-consuming, not readily available and rarely successful.

In sum, the available alternatives to the exclusionary rule cannot measure up to the task of ensuring Fourth Amendment compliance. Only the exclusionary rule can achieve that. Justice Stewart eloquently placed the alternative remedies in proper perspective:

Taken together, the currently available alternatives to the exclusionary rule satisfactorily achieve some, but not all, of the necessary functions of a remedial measure. They punish and perhaps deter the grossest of violations, as well as governmental policies that legitimate these violations. They compensate some of the victims of the most egregious violations. But they do little, if anything, to reduce the likelihood of the vast majority of fourth amendment violations — the frequent infringements motivated by commendable zeal, not condemnable malice. For those violations, a remedy is required that inspires the police officer to channel his enthusiasm to apprehend a criminal toward the need to comply with the dictates of the fourth amendment. There is only one such remedy — the exclusion of illegally obtained evidence.

Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, 1389 (1983).

### **C. The Alleged Costs Of The Exclusionary Rule Pale In The Face Of Its Substantial Benefits**

1. Petitioner argues that the exclusionary rule deprives the courts of relevant and trustworthy evidence and therefore results in the freeing of guilty persons (Pet. Br. 68-70). Fundamentally, this argument is misdirected. It is not the

exclusionary rule, but the Fourth Amendment, which prohibits police from making unreasonable searches and seizures. In balancing the concern for privacy and the need for law enforcement embodied in the Fourth Amendment the founders recognized that police must be controlled even at the expense of truth-finding.<sup>44</sup> Moreover, critics of the exclusionary rule sometimes fail to recognize that the same relevant and trustworthy evidence would never have found itself into police hands had the officer complied with the Fourth Amendment in the first place.<sup>45</sup>

In practice, the application of the exclusionary rule actually sets few criminals free. Empirical data support Professor LaFave's judgment that "the 'cost' of the exclusionary rule, in terms of acquittals or dismissed cases, is much lower than is commonly assumed." 1 W. LaFave, *Search And Seizure: A Treatise On The Fourth Amendment*, §1.2, n. 9 (Supp. 1982). Available data indicates the minimal

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<sup>44</sup>This sentiment was recently articulated by the Eighth Circuit:

A system of law that not only makes certain conduct criminal, but also lays down rules for the conduct of the authorities, often becomes complex in its application to individual cases, and will from time to time produce imperfect results. . . . Some criminals do go free because of the necessity of keeping government and its servants in their place. That is one of the costs of having and enforcing a Bill of Rights. This country is built on the assumption that the cost is worth paying, and that in the long run we are all both freer and safer if the Constitution is strictly enforced.

*Williams v. Nix*, 700 F.2d 1164, 1173 (8th Cir.), cert granted, 103 S.Ct. 2427, case no. 82-1651 (1983). Justice Harlan described the judicial perspective: "We do not release a criminal from jail because we like to do so, or because we think it is wise to do so, but only because the government has offended constitutional principle in the conduct of his case." *Desist v. United States*, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting). See Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More Than "An Empty Blessing,"* 62 *Judicature* 337, 343-44 (1979) (Rule's opponents often confuse the exclusionary rule with the substantive law of search-and-seizure).

<sup>45</sup>The Court has recognized this in cases addressing the "fruits of the poisonous tree doctrine," see *Wong Sun v. United States*, 371 U.S. 471, 484-86 (1963) and its progeny, e.g. *United States v. Ceccolini*, 435 U.S. 268 (illegally obtained evidence need not be excluded if the government can establish that the evidence would have been obtained in the absence of the illegal search).

impact of the rule in three respects: first, petitioner's assertions notwithstanding, prosecutions are declined for Fourth Amendment reasons in relatively few cases; second, in cases where suppression motions are filed, they are seldom granted; and third, the appellate courts render decisions on Fourth Amendment issues that are favorable to the prosecution in significantly more cases than those favorable to the defense.

With reference to cases declined for prosecution, a 1979 study conducted by the General Accounting Office found that of all cases declined for prosecution by United States Attorneys, Fourth Amendment issues were the primary reason in only 0.4% of the total.<sup>46</sup> Similar results have been obtained in studies made on the state level. An Institute for Law and Social Research (INSLAW) study revealed that in 1974 in the District of Columbia only 3.5% of all victimless crime arrests were not prosecuted for due process problems, only a part of which represented Fourth Amendment claims.<sup>47</sup> Also, an LEAA-funded study by Kathleen Brosi concluded that in 1977 prosecutions were declined on due process grounds (and less on search and seizure grounds) in victimless crime cases ranging from 1% of rejected cases in the District of Columbia, 2% in Salt Lake City, 4% in Los Angeles and 9% in New Orleans.<sup>48</sup> More recently, in 1980,

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<sup>46</sup>Comptroller General, U.S. General Accounting Office, *Impact of the Exclusionary Rule on Federal Criminal Prosecutions* 14 (1979) (Rep. No. GGD-79-45) (hereinafter "GAO Study"). This study is particularly relevant here as the instant case involved a federal prosecution. Petitioner attempts to minimize the finding of the study by postulating that federal prosecutions are not declined because "relatively few federal cases involve manifestly illegal searches." (Pet. Br. 70 n. 34). However, petitioner seems to neglect the fact that Fourth Amendment issues may not be raised because the chance of success is minimal (see pages 62-63, *infra*).

<sup>47</sup>Canon, *Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for Its Retention*, 23 S. Tex. B.J. 559, 573 (1982). Professor Canon estimated that only 2% of all persons arrested for victimless crimes were not prosecuted because of the exclusionary rule.

<sup>48</sup>K. Brosi, *A Cross-City Comparison of Felony Case Processing*, 16, 19 (1979). Of more than 15,000 declinations for due process reasons, the study revealed that only one homicide and no rapes were involved.

California prosecutors dropped charges in 938 cases out of 40,451 narcotics arrests, or 2.3% of the cases due to search and seizure problems.<sup>49</sup> Finally, in a National Institute of Justice study of California prosecutions, search and seizure issues led the state to decline prosecutions in only 4.8% of its felony cases.<sup>50</sup>

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<sup>49</sup>Davies, *Do Criminal Due Process Principles Make A Difference?* 1982 Am. Bar Foundation Res. J. 247, 265. It is noteworthy that petitioner cites only the National Institute of Justice Study (NIJ Study) on California prosecutions and makes no mention of this one. Petitioner also fails to mention more recent data on California disputing the NIJ claim that 30% of felony drug arrests were rejected for search and seizure reasons. See, Fyfe, *Enforcement Workshop: The NIJ Study of the Exclusionary Rule*, 19 Crim. Law Bull. 253 (1983).

<sup>50</sup>National Institute of Justice, U.S. Dept. of Justice, *The Effects of the Exclusionary Rule: A Study in California* (1982) (NIJ Study). Petitioner cites the NIJ Study for three propositions: 4.8% of more than 4,000 felony cases were declined for prosecution on search and seizure grounds; 30% of felony drug arrests were declined on the same grounds; and the exclusionary rule frees the recidivist (Pet. Br. 70-71).

The reliability of the NIJ Study and petitioner's interpretation of it are suspect. First, it is noteworthy that the reported impact of Fourth Amendment concerns on declinations is markedly greater in the NIJ Study than in all other such studies, state and federal, including other California studies. Second, the study was conducted by the NIJ, purportedly a part of the Department of Justice, and in great haste (believed to have commenced in October and concluded in December 1982). Third, the claim that 4.8% were rejected on search and seizure grounds (itself not a substantial figure) is misleading; the relevant measure of the rule's cost is not what percent of *rejected* cases (86,033) were declined on Fourth Amendment grounds, but what percent of felony complaints (520,993) were so rejected. Kamisar, American Bar Association, Criminal Justice Section debate, 33 Cr. L. Rptr. 2404, 2408-12 (Aug. 17, 1983). The NIJ figures show that less than 0.8% of arrests made by police were reported by police and prosecutors as declined on such grounds. Furthermore, the finding that 30% of drug arrests were declined on search and seizure grounds is unreliable as the sample upon which the statistic is based (114) is too small to carry any statistical value — a point recently made by Judge Shirley Hufstедler (American Bar Association, Criminal Justice Section debate, 33 Cr. L. Rptr. 2404, 2410-12 (Aug. 17, 1983)). Finally the claim that the exclusionary rule causes recidivism is similarly meritless. The study looks at recidivism only in terms of crimes committed by those released due to case declinations. Neither the study nor petitioner included any comparative data on re-arrest rates for those with criminal records; and assuming that those who have previously been incarcerated commit more crime after release than those not incarcerated (an assumption commonly recognized by the criminal justice community), it would be equally reasonable to conclude that the exclusionary rule prevents crime.

The second classification of data revealing the minimal "costs" of the exclusionary rule is data indicating that suppression motions are seldom granted. For example, the GAO Study concluded that only 1.3% of the federal cases processed (36 of 2,804 cases) involved a successful Fourth Amendment suppression motion. Moreover, the study revealed that in about 50% of those cases where the motion was granted, the defendant was nonetheless convicted. GAO Study, *supra* note 46 at 11. Similarly, the often-cited study by Professor Oaks showed that in Washington, D.C. only in 4% of the narcotics cases did successful suppression motions occur and this happened in less than 1% of all other felony case categories. Further, in only about 50% of cases involving successful suppression motions were the charges dismissed. Oaks *supra*, 37 U. Chi. L. Rev., Table 7, at 686-87. See also, Davies, *supra*, 1982 Amer. Bar Assn. Res.J. at 265; K. Brosi, *supra* at 18-20. Indeed, in the instant case, the granting of the suppression motion was not only a rarity, but the district court's application of the standing doctrine to prevent challenge to certain of the searches may well permit the prosecution to obtain convictions despite the exclusion of evidence.<sup>51</sup>

Finally, appellate court decisions on suppression motions generally rule in favor of the prosecution. Though the available data is relatively scarce on this question, one study revealed that the California First District Court of Appeal reversed only 6% (8 of 151 cases) of trial court denials of suppression motions. On the other hand, the prosecution won reversal of eight trial court grants of suppression motions. See Davies, *supra* 1982 Am. Bar Foundation Res. J. at 266-67.

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<sup>51</sup>Reported decisions substantiate that suppression does not necessarily lead to a failure of prosecution. The defendants in three cases heard by this Court — *Coolidge v. New Hampshire*, 403 U.S. 445 (1971); *Davis v. Mississippi*, 394 U.S. 721 (1969); and *Bumper v. North Carolina*, 391 U.S. 543 (1968); — were all convicted of heinous crimes on remand. Mertens & Wasserstrom, *supra*, 70 Geo. L.J. at 445-46.

To conclude, though the empirical data on the question of the degree to which the exclusionary rule frees the guilty is not absolutely conclusive, "virtually all of a growing body of evidence points to the conclusion that the rule has had only a very small impact in keeping seemingly guilty persons out of jail." Canon, *supra*, 23 S. Tex L.J. at 575.<sup>52</sup> Indeed, recognizing the validity of this conclusion, Justice Stewart pronounced that "there is absolutely no evidence that the exclusionary rule is in any way responsible for the horrible increase in the crime rate in the United States in the last several decades." Stewart, *supra*, 83 Colum. L. Rev. at 1394.

2. Petitioner urges that the exclusionary rule serves to lessen public respect for the judicial system through its indiscriminate and disproportionate application (Pet. Br. 71-73).<sup>53</sup> If the public holds the exclusionary rule accountable for the woes of our judicial system (a proposition not demonstrated by petitioner), it suffers from a misperception. It is not the rule which makes the police conduct unconstitutional; rather, it is the Fourth Amendment, as interpreted by the courts of our nation, that does so. If evidence is

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<sup>52</sup>Moreover, in narcotics cases the government has devised its own methods to deter and punish illegal activity regardless of the effect of the exclusionary rule on the criminal prosecution. Under the civil forfeiture statutes, 21 U.S.C. §881 *et seq.* the Court can order the defendant to forfeit items of value which are used to facilitate a narcotics transaction. The government has used these statutes as an effective weapon against suspected narcotics violators. See, e.g. *United States v. One 1979 Mercury Cougar*, 666 F.2d 228 (5th Cir. 1982) (seizure of automobile that did not carry contraband but used merely to locate storage building); *United States v. One 1976 Porsche*, 670 F.2d 810 (9th Cir. 1979) (seizure of auto containing only small amount of marijuana).

<sup>53</sup>With reference to its claim that the rule is not applied proportionately, petitioner notes that other countries have not adopted the rule. Justice Stewart refutes the need for proportionality, noting that "this disproportionality is significant only if one conceives the purpose of the rule as compensation for the victim. Because I view the exclusionary rule as necessary to preserve fourth amendment guarantees, I do not find this criticism persuasive." Stewart, *supra*, 83 Colum. L. Rev. at 1396. Also, the comparison with other countries is not well-founded. See Kamisar, *supra*, 62 Judicature at 348; see also Bradley, *The Exclusionary Rule In Germany*, 96 Harv. L. Rev. 1032 (1983).

excluded from a criminal prosecution (an infrequent occurrence, particularly in violent crime cases), it is because the police officer has overstepped the bounds of legality.

Furthermore, application of the exclusionary rule may not be popular at a time of increasing crime rates. But the unpopularity of judicial decisions has never been a sound reason to change them. As Justice Stewart recently recognized, “. . . there is . . . a need — one essential to the concept of an independent judiciary — to steel oneself against the inevitable tide of public comment directed at unpopular decisions.” Stewart, *supra*, 83 Colum. L.Rev. at 1392. Indeed, this Court has authored decisions which, though unpopular, were at the forefront of significant societal changes.<sup>54</sup>

Finally, the virtual elimination of the exclusionary rule implicit in the good-faith proposal may severely weaken popular trust in government. “The exclusionary rule is important . . . as an official model of the government’s refusal to tolerate any police illegality.” Goodpaster, *An Essay on Ending the Exclusionary Rule*, 33 Hast. L.R. 1065, 1089 (1982). Because of this, the public feels more secure in their homes and papers. They also have more respect for our laws because they know that nobody, not even police officers, are above it. The symbolic impact of the rule is particularly germane to the instant case where the searches in question invaded the sanctity of the home and violated the very command of the Fourth Amendment prohibiting government intrusions on less than probable cause. Perhaps the duration of the exclusionary rule for seventy years speaks most convincingly of the public belief that, “if the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.” *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

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<sup>54</sup>E.g. *Roe v. Wade*, 410 U.S. 113 (1973); *Brown v. Board of Education*, 349 U.S. 294 (1955).

3. Petitioner further argues that the exclusionary rule burdens the judicial system by encouraging the filing of suppression motions, thereby diverting resources from criminal trials (Pet. Br. 74-76). This contention seems to condemn defendants for exercising their right to challenge the admission of unconstitutionally-seized evidence. Although the prospect of exclusion may make the motion worth the effort, without exclusion Fourth Amendment rights would not be enforced and articulated in court decisions. If petitioner seeks to conserve judicial resources through the adoption of a good-faith proposal, it neglects to recognize the expanded complexity and duration of suppression hearings likely to result from such a proposal. Moreover, the exclusionary rule may actually encourage dispositions without trial by causing both sides to reach a compromise settlement. Goodpaster, *supra* 33 Hast. L. Rev. at 1086. This, in turn, not only conserves judicial resources, but frees trial courts to hear cases of the innocent seeking vindication.

4. Another cost of the exclusionary rule cited by petitioner is the rule's failure to provide a remedy for the innocent victims of illegal searches and seizures (Pet. Br. 74). This argument does not suggest that the rule is not a necessary remedy to deter police misconduct; it only suggests that it is not a sufficient remedy. Innocent victims do have a tort remedy against the police for damages. *Bivens*, 403 U.S. 388. Perhaps, expanded victim compensation should be the focus of legislative debate in the Congress. But it is short-sighted to suggest that the rule affords no protection to the innocent. By enforcing the Fourth Amendment, the exclusionary rule decreases the amount of potential innocent victims by giving police reason to restrict their own intrusive activity.

5. Petitioner contends that the exclusionary rule tends to chill police investigation in the "gray areas" of the Fourth Amendment cases (Pet. Br. 73-74). Once again, this criticism is properly directed at the Fourth Amendment, not the exclusionary rule, for it is the Amendment which limits

police actions. The framers' command that no warrant issue but upon probable cause necessarily recognized that police officers who obey its strictures will inevitably catch fewer criminals. Indeed, this is the price paid for liberty and security of person, home and property. Furthermore, the very gravity of the sanction of exclusion may increase its deterrent capabilities. "To the extent that exclusion is perceived as a harsh sanction, it may provide a greater incentive for the police to comply with the fourth amendment." Stewart, *supra*, 83 Colum. L. Rev. at 1395. To, as petitioner proposes, permit police to invade privacy in the gray areas will only serve to make the Fourth Amendment itself a gray area.

6. Finally, petitioner claims that the exclusionary rule threatens the Fourth Amendment because judges are reluctant to condemn police practices if such will free guilty defendants (Pet. Br. 76-77). It is curious that petitioner makes this claim in light of its previous argument that the rule frees guilty defendants. Although suppression motions are seldom granted, through the years courts have excluded evidence, when merited, such that a whole body of Fourth Amendment law has been promulgated by this and other courts throughout the system. Moreover, in those cases where courts decline to exclude evidence in the face of contrary legal precedent, they are law-breakers like the police who committed the unconstitutional search or seizure. The Fourth Amendment is not threatened by the exclusionary rule; it is enforced by the rule. Rather, the Fourth Amendment is threatened by police who invade privacy in violation of the Amendment and courts, hopefully few, which ignore the dictates of the Amendment and render decisions contrary to law.

## CONCLUSION

The Court is respectfully requested to affirm the judgments under review.

Respectfully submitted,

JAY L. LIGHTMAN

ROGER L. COSSACK

*Counsel for Respondents*

*Sanchez, Stewart and Del*

*Castillo*

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